United States Court of Appeals

for the Second Circuit

APPENDIX

77-7174

77-7174

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
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A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

FRANCES JOY CAPERS, et al.,

Plaintiffs-Appellants,

against

LONG ISLAND RAILROAD, et al.,

Defendants-Appellees.

On Appeal from the United States District
Court for the Southern District of New York

JOINT APPENDIX

VOLUME II
Pages A-264 -- A-631

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

FRANCES JOY CAPERS, et al., each individually and on behalf of all other persons similarly situated,

Plaintiffs,

-against-

LONG ISLAND RAILROAD, et al.,

Defendants.

- x

72 Civ. 3168 (LPG)

ORDER TO SHOW CAUSE

Upon the annexed Affidavits of Richard J. Holwell, Esq. and Edward E. Harris, sworn to November 16, 1976,

And it appearing to the Court that immediate and irreparable injury, loss or damage will result to plaintiff Edward E. Harris if defendant is not restrained from removing said plaintiff from his position of Assistant Station Master in that he will be unable to re-attain that position once having lost it, and will suffer continuing and overt discrimination on the basis of race, and it further appearing to the Court that counsel for plaintiff has complied with the notice requirements of Rule 65 of the Federal Rules of Civil Procedure, it is

ORDERED, that defendant show cause in Room 2603 of the United States Courthouse, Foley Square, Borough of Manhattan, City of New York on the day of November, 1976, at , or as soon thereafter as counsel can be heard why an order should not be entered herein pursuant to Rule 65 of the Federal Rules of Civil Procedure for a preliminary injunction enjoining during the pendency of this action defendant and its officers, agents, servants and all persons

acting under its control and each of them from removing Mr. Harris from his present position as Assistant Station Master and awarding to Mr. Harris reasonable counsel fees in connection with bringing this motion, and it is further

ORDERED, that plaintiff is hereby granted expedited discovery so that the depositions of the Long Island Railroad by the employees Ed Lehr, Lou Rizzacasa, J. R. Bloomfield, Joseph Gaynor, and of such other persons as may be necessary be held at the offices of White & Case, 14 Wall Street, New York, New York, at 10:00 A.M. on November , 1976, and that the documents requested in Schedule A to the Notice of Deposition be produced, with the deposition of the plaintiff to follow immediately upon the completion of said depositions, and it is further

ORDERED, that pending hearing and determination of said motion, defendant and its officers, agents, servants and employees and all persons acting under their control and each of them are temporarily restrained from taking any action to remove Mr. Harris from his position of Assistant Station Master. Sufficient cause appearing therefor, service on defendant of a copy of this Order to Show Cause, together with copies of the supporting papers on or before the day of November, 1976 shall be deemed sufficient service.

Dated: New York, New York
November , 1976

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

FRANCES JOY CAPERS, et al., each individually and on behalf of all other persons similarly situated,

Plaintiffs,

-against-

LONG ISLAND RAILROAD, et al.,

Defendants.

: 72 Civ. 3168 (LPG)

: AFFIDAVIT

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RICHARD J. HOLWELL, being duly sworn, deposes:

1. I am a member of the Bar of this Court and associated with the firm of White & Case, attorneys for FRANCES JOY CAPERS, et al., each individually and on behalf of all other persons similarly situated, plaintiffs in this action. I make this Affidavit in support of the annexed Order to Show Cause and Temporary Restraining Order, and in compliance with Rule 65 of the Federal Rules of Civil Procedure.

2. The relevant facts are set forth in the Affidavit of Mr. Edward E. Harris annexed to the Order to Show Cause. The Affidavit states that the defendant Long Island Railroad, in retaliation for Mr. Harris' suit against it and as a further act of discrimination against him, has removed him from his position of Assistant Station Master ("ASM") without a hearing. The supposed grounds for such removal were that he performed his duties improperly on November 10, 1976 causing an eleven minute delay in the departure of a train from Pennsylvania Station and that although he had

made the required entry in the log book as well as an oral report, he did not make a supplemental written report of the incident within the time requested. The Affidavit further states that Mr. Harris performed his duties properly on November 10, 1976, was not responsible for the delay in departure, and did not fail to perform his duties with respect to the report. On Mr. Harris' information and belief, no similarly situated white employee has ever been sanctioned for such reasons as alleged.

3. This is the third time Mr. Harris has been removed from his position as Assistant Station Master on spurious grounds in slightly more than two years. In August 1974, the defendant removed Mr. Harris from service as an Assistant Station Master at Penn Station for the first time for alleged failure of a Book of Rules examination which plaintiff contended was conducted in a manner never previously resorted to with respect to white employees similarly situated. The facts as to this retaliatory action by the Railroad are more fully set forth in Mr. Harris' Affidavit dated August 23, 1974, attached hereto as part of Exhibit A. On September 20, 1974, this Court conducted an evidentiary hearing in connection with Mr. Harris' application for preliminary relief enjoining the Railroad from removing him from his position as an ASM. During the course of Mr. Harris' direct examination at that hearing, and at the Court's suggestion, the matter was resolved when the defendant agreed to continue Mr. Harris as an ASM if he passed a Book of Rules examination given to a randomly selected group of ASM's similarly situated. Mr. Harris subsequently received the highest score of the seven Assistant Station Masters taking the test and was continued

in the position while several of the white ASMs--who had not taken a written Book of Rules examination in several years--failed to pass.

4. In September of 1975, the Railroad removed Mr. Harris from service as an ASM for a second time on the grounds that he was "insubordinate" to one of his superiors. The facts as to this further attempt to intimidate Mr. Harris are more fully set forth in Mr. Harris' Affidavit dated September 16, 1975 attached hereto as Exhibit A. On October 1, 2 and 3, 1975, this Court conducted a second evidentiary hearing in connection with Mr. Harris' application for preliminary relief enjoining the Railroad from again removing Mr. Harris from his ASM position. Following the completion of these hearings, again at the Court's suggestion, the matter was resolved when the parties agreed that Mr. Harris should continue as an ASM after 60 days off the job. This agreement was made without prejudice to either party's position and was not to be considered a disciplinary action or in any way made a part of Mr. Harris' personnel records.

5. At the end of the period agreed to by the parties and described above, the Railroad informed us that Mr. Harris would have to take a physical examination before being reinstated. We objected on the ground that such a requirement had not been part of the settlement and that the Railroad had failed to show that this was a bona fide requirement imposed on other employees of the Railroad in similar circumstances. After a hearing, the Court ordered Mr. Harris to undergo the physical, which he passed.

6. I had discussions relating to this matter with Richard Stokes, Esq. and Laurence Rubin, Esq.,

attorneys for the Long Island Railroad, representing defendant. On November 12, 1976, Mr. Stokes indicated that defendant would not reinstate Mr. Harris as an Assistant Station Master. On November , 1375 I advised Mr. that plaintiff would apply to this Court for a Temporary Restraining Order at on November , 1976, in Room 2603.

7. No previous application for this relief has been made other than the relief sought in 1974 and 1975 as discussed in paragraphs 3 through 5 herein.

Richard J. Holwell

Richard J. Holwell

Sworn to before me this
17th day of November, 1976.

Notary Public

TONI ANN IACONELLI
Notary Public, State of New York
No. 24-4523995
Qualified in Kings County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FRANCES JOY CAPERS, et al., each individually and on behalf of all other persons similarly situated,	:	72 Civ. 3168 (LPG)
Plaintiffs,	:	
-against-	:	**AFFIDAVIT**
LONG ISLAND RAILROAD, et al.,	:	
Defendants.	:	

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

EDWARD E. HARRIS, being duly sworn, says:

1. I am a black citizen of the United States, and an employee of defendant, Long Island Railroad (the "Railroad"), and a member of a class of plaintiffs bringing this lawsuit. I make this affidavit in support of my motion for a temporary restraining order restraining the Railroad from future violations of my rights under Title VII of the Civil Rights Act of 1964 and ordering the Railroad to reinstate me in the position of Assistant Station Master ("ASM").

2. This is the third time in slightly over two years that I have been forced to appear before this Court to seek injunctive relief as a result of the Railroad's retaliatory measures taken against me as a plaintiff in this action. I was first forced to seek injunctive relief in

August, 1974 when the Railroad attempted to remove me on spurious grounds from my position of ASM. The history of the Railroad's discriminatory activities against me is contained in my affidavit which was submitted in support of that 1974 motion, a copy of which is attached hereto as part of Exhibit A and in my testimony in the course of the 1975 hearing.

3. In short, the Railroad attempted to remove me in 1974 from ASM to the lower-ranking "usher" status on the purported grounds that I had "failed" an examination which the Railroad demanded that I take and which examination was not required of other ASMs. As a result of my motion, Judge Owen of this Court ordered that the Railroad maintain me in my position of ASM with the same seniority and pay status pending the outcome of a hearing on the preliminary injunction motion. During the course of my testimony on September 20, 1974 at the preliminary injunction hearing, and at the suggestion of the Court, the matter was resolved when the Railroad agreed to maintain me as an ASM if I passed another Book of Rules examination which would be administered to me and six of the eleven other ASMs. I took this examination and scored higher than any other ASM selected to be similarly tested.

4. I was again forced to seek injunctive relief in September, 1975 when the Railroad, continuing its pattern of harassment and retaliatory action against me, attempted to remove me on the ground of "insubordination". Following the hearings held in connection with my 1975 motion, I was reinstated in my former position after a period of two months

following my removal from service. The terms of this settlement specifically provided that this period was not to be considered a suspension or a reflection of any sort on my work record. It was for this reason, as well as the necessity of providing for my wife and children, that I accepted this settlement. The ongoing story of the Railroad's discriminatory activities against me is contained in my affidavit which was submitted in support of that 1975 motion, a copy of which is attached hereto as Exhibit A, and the testimony taken at that hearing.

5. Even after the settlement of that matter, the Railroad continued to seek to harass me, by contending that I was required to submit to a physical examination before resuming my duties. The Court ordered that I submit to such an examination, over my objection that it was not part of the settlement terms and not required of other employees.

6. The Railroad has continued its campaign to harass and humiliate me. Manufactured charges against me have twice before been brought before this Court; the Railroad persists in its determination to fire me. On November 11, 1976, I was dismissed from my position as Assistant Station Master for the third time and am now charged with allegedly causing an eleven minute delay in the departure of train No. 82 on November 10, 1976 and of failing to file a timely supplemental report of the November 10, 1976 incident even though a report had been made in the log book and orally as well.

7. The eleven minute delay was due to a failure to reposition train No. 82 in a timely fashion as necessitated by the closing for repairs of one tunnel leading out of Pennsylvania Station. This was due to no fault on my part as I was not notified of the tunnel closing until 12:41 A.M., the minute train No. 82 was due to depart. In any event, if the Railroad dismissed every employee involved in an eleven minute delay of a single train, there would not be any workers left to run the trains. Moreover, the supplemental report of the November 10, 1976 incident requested by Mr. Gaynor through Mr. Bloomfield was incomplete as of the evening of November 11, 1976 because of an extremely busy workload the evening of November 10 and because of justifiable personal reasons. To the best of my knowledge, a simple delay in the completion of a supplemental report (particularly in light of the fact that a report had been made in the log book and orally as well) has never before resulted in the dismissal of any white employee similarly situated.

8. Before discussing the events of November 9, 10, and 11, it is necessary to supply the Court with some background information. There are four tunnels or "lines" into and out of Pennsylvania Station. Lines 1 and 2 are for normal use by Amtrak and the New Haven Railroads. Lines 3 and 4 are allocated to the Long Island Railroad. The even numbered lines are for westbound traffic and the odd numbered lines are for eastbound traffic. On an average of about three times a week, line 3 is temporarily closed during the early morning hours for repair. When line 3 is closed the Long Island Railroad eastbound trains must be sent through line 1. Each train rescheduled to use line 1 must be positioned at a location different from that for a departure

through line 3.

The repositioning of a train requires the cooperation of a number of people. "A" tower, run by the Penn Central, controls the traffic into and out of Pennsylvania Station. When the Road crew is ready to work on a line, "A" tower has the responsibility of notifying the Yardmaster, "C" tower, and the Station Master of the line closing so that incoming trains can be properly repositioned. The Yardmaster, a Long Island Railroad employee, has the responsibility of placing the train in its proper place on its proper track. "C" tower, manned by Penn Central personnel, has equipment which allows it to detect a "fouling" or improper positioning of a train. It is the responsibility of "C" tower to notify the Yardmaster and Station Master of such a fouling. The Station Master, and in his absence the Assistant Station Master, has overall responsibility for the station. His duties principally include setting up passenger trains so that they are loaded properly, providing passenger information, public relations and supervising station police. In practice the Assistant Station Master also assists the Yardmaster and "C" tower in positioning the train by notifying them of an improper train placement. When a line closes it would traditionally be the job of the special yard crew to move an incoming train from its scheduled stopping position to its new position necessitated by the line closing. In recent practice an Assistant Station Master has been of further assistance to the Yardmaster and "C" tower by notifying the engineer of an incoming train of the new position, thereby saving the "extra" yard crew from

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the necessity of moving the train to the new position.

Communication between "C" tower, "A" tower, the Yardmaster and the Assistant Station Master is critical to the smooth running and safety of a terminal area. Such communication can be had either by telephone or by a direct line-speaker system.

9. Ordinarily, the individual in "A" tower communicates all information as to line closings directly to the Assistant Station Master (as well as to the Yardmaster). John Segreta was on duty in "A" tower on the evening of November 9 and the morning of November 10, 1976. Mr. Segreta has, over the past two months, refused to speak or to communicate in any way with me on the job. I have made known this state of affairs to my supervisors, but no one has made any attempt to remedy the situation.

10. I arrived at the Station Master's office at 10:43 P.M. on the evening of November 9. I was informed by Jim Bloomfield, an Assistant Trainmaster completing his shift, that line 3 was to be closed sometime between 11 P.M. and 7 A.M. the next morning and that an "extra" yard crew was on duty. At approximately 11:45 I contacted the Yardmaster, Mr. Ed Lehr, by telephone. I asked him if he knew when line 3 would be taken out of service. He indicated that he did not know when the line would be taken out but that he would call me back. About 6 or 7 minutes later Mr. Lehr called and gave me the lineup changes (those changes of track occasioned by the line closing) for all trains after No. 802 (which was due to depart at 1:01 A.M.). Both of us knew from prior practice that line 3 would most likely be put out of service by 1:00 A.M. However, no

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lineup changes were provided for those trains scheduled to depart between 12:00 A.M. and 1:00 A.M. as neither of us knew the exact time the line would close down. Sometime between 12:05 and 12:15 I again called Mr. Lehr and asked him whether he had heard anything from "A" tower with respect to the exact time that the line was to close. He answered in the negative.

11. At 12:24 A.M., two minutes behind schedule, train No. 489 entered the station, stopped on the eastbound end of track 17 and discharged its passengers. Train No. 489 would become train No. 82 (scheduled to depart at 12:41 A.M.) on its departure. It was loaded with passengers and at 12:41 its doors were closed. It was ready to pull out of the station when "A" tower announced over the loud speaker that line 3 was out as of 12:41 A.M. I immediately contacted "A" tower over a direct line and told Mr. Segreta that train No. 82 was about to depart and the line should not be closed at that moment. I asked him to wait until the 12:41 departed before closing line 3 for repairs. As Mr. Segreta knew, unless line 3 remained open, the train would have to be delayed in order to reposition it for departure on line 1. He told me, in words or in substance not to tell him when to take out a tunnel. At that time, while I was on the line with "A" tower, "C" tower informed me over another direct line that train No. 82 was fouling (i.e., was in the wrong position) and would have to be pulled west to its proper position for departure over line 1. Following standard procedure, I immediately informed the Yardmaster to get his crew to pull the train west on

track 17, contacted "C" tower for the proper signal, contacted the engineer to remove his keys and contacted the Car Inspection Foreman, Mr. Winston, with respect to a new brake test. Train No. 82 was pulled west behind the proper signal, the brakes were retested and, then, at 12:52 A.M., eleven minutes behind schedule, it departed eastbound through line 1.

12. I left the Station Master's office at 7:00 A.M., the morning of November 10. Before leaving I entered a report of the incident in the log book, stating in essence what is detailed above.

13. I came to work at approximately 10:45 P.M. on November 10, 1976. When I arrived at the station Mr. Bloomfield, an Assistant Trainmaster, informed me that Joe Gaynor, the terminal superintendent, wanted a written statement from me explaining the incident which occurred in the early morning hours of November 10, 1976 by the next morning. He also informed me that line 4 would be closed that night, although the decision to close the line was later rescinded.

14. The night of November 10 and the morning of November 11, 1976, I was usually busy taking care of the running of the "Sperry cars" in addition to performing my other duties. The Sperry cars are run on each of the four lines to check for and locate defects. This necessitates more work than usual in that I must be aware of all four lines during the running of the Sperry cars, as each line must be closed down at some point during the night.

15. I started to write up a report for Mr.

Gaynor during the early morning hours of November 11 but was unable to complete the report because of the time demands on my job that morning. I returned home at about 9:00 A.M. on November 11 and immediately called Lou Rizzacasa to ask him to please tell Mr. Gaynor that I did not have time to finish the report and that I would try to finish it and bring it in that night.

16. I went to sleep fully intending to draft the report as soon as I awakened. I awoke at 4:00 P.M. and had to rush to my dentist, Dr. Clarence Boone, as an inlay had fallen out of my mouth. I arrived by 5:00 P.M., waited for a while, had my tooth fixed and left at about 6:10 P.M.. Although I hadn't completed the report by the time I went to work the evening of November 11, I believed I could complete the report before the morning of November 12 and leave it for Mr. Gaynor, who normally begins work at about 10:00 A.M.

17. When I arrived at the station at about 10:49 P.M. on November 11, Mr. Gaynor, Mr. Bloomfield and Mr. McKenna were waiting for me. Mr. Gaynor asked me if I had the report. I explained to him why I did not. He asked me what happened in the early morning hours of November 10, 1976. I explained to him exactly what happened. Mr. Gaynor said that Mr. Lehr had reported that he told me when line 3 was going to be closed. I told Mr. Gaynor that Mr. Lehr had never told me at what time line 3 was to be closed. Mr. Gaynor then said: "I can't take this anymore, I've had enough of this, you didn't even bring the statement you said you would... I just can't buy that -- you're removed from your job." He said that I should report to Mazzanotti and from then on I would be an usher.

18. In light of the Railroad's discrimination against me in the past for my role as a plaintiff in this action, in light of the fact that I was not at fault in causing the eleven minute delay, and furthermore, in light of the nature of the alleged neglect of duties for which I was removed from service, I can only conclude that my latest dismissal is part of the Railroad's campaign of harassment and retaliation against me for my participation as a class member in this case. Although I have been a loyal Railroad employee for 22 years, the Railroad's retaliatory measures leave me with only my seniority as an usher and the humiliation suffered from being the object of the Railroad's racially discriminatory practices. If the Railroad is permitted to fill my position with another employee, an extremely difficult barrier will have been created to my regaining a position which has thrice been wrongfully taken from me. Moreover, the Railroad will have been encouraged to continue its pattern of manufacturing charges and otherwise discriminating against me for having had the courage to be a named plaintiff in an action against the Railroad to establish the constitutional and federal right of black individuals to be free from racial discrimination.

19. On the basis of this affidavit and the prior history of this action, I respectfully request this Court to order the Railroad to cease immediately its continuing discriminatory and retaliatory tactics against me,

reassign me immediately to my former position as an ASM with the stipulation that no further action be taken against me by the Railroad except upon order of this Court and for good cause shown pending the outcome of this action, and to award me counsel fees in connection with the bringing of this motion.

Edward E. Harris

Edward E. Harris

Sworn to before me this
16th day of November, 1976.

Todd B. Solis

Notary Public

TODD B. SOLIS
Notary Public, State of New York
No. 31-4617715
Qualified in New York County
Commission Expires March 30, 1977

EXCERPTS FROM PROCEEDINGS OF
U. S. DISTRICT COURT HELD
ON DECEMBER 10-15, 1976
AND JANUARY 3-4, 1977

(Pages A- 282 to A- 602 following)

Q Did either Mr. Bloomfield or McKenna have any information for you?

A Yes. Mr. McKenna and Mr. Bloomfield informed me that line number 3 was going out of service some time that night between the hours of 11 and 7 the next morning.

Q Mr. Harris, I would like to show you another record kept by the Long Island Railroad, which is the track and signal diagram.

MR. HOLWELL: I have shown it to defense counsel.

THE COURT: Any objection?

MR. STOKES: I have no objection, your Honor, as long as the record clearly reflects that this track and signal diagram is not in any way to scale.

THE COURT: All right.

MR. HOLWELL: We frankly don't know, your Honor, whether or not it is to scale.

(Plaintiff's Exhibit 2 was received in evidence.)

xxxx

to seven the next morning.

I waited until Eddie Lehr came on duty, which was 11:30, and generally I gave him a little time to acquaint himself with his task of the night, and I called him at about 11:45 and asked him whether he had any notes in regards to the same fact.

He told me he had, and I asked him did he speak with A Tower on it, did he have any specifics as to what time this line was going to be ought.

He said no, he hasn't, at that particular time, because we would continue to load on the normal tracks until we did get some specifics on it.

End AM T3

(Continued on next page)

other duties around the stationmaster's office, and at 11:55, Mr. Lehr yelled into the squawk box to my office, as well as to Vinnie -- he was calling Vinnie at C Tower -- he says, "Vinnie, Line 3 is going out of service tonight, and when it does, will you please inform us whenever -- if there is a fouling in any place, please inform us immediately."

I reiterated that to Vinnie. Vinnie promised that he would do just that.

Q During this time did you make any efforts to contact anybody else?

A During that time I attempted to reach A Tower. In other words, I rang his number.

Q Did anybody answer?

A No one answered. The general practice, I have a direct line with A Tower, and the general practiceis if I call him or if he calls me -- this has been the general practice under normal conditions -- the line would light up, it says that A Tower is calling. If I am too busy at that particular time, if I am on other phones, the moment I get a little time, I will call him, and vice-versa.

During the past couple of months, this has not happened. He's just ignored his phones.

Q After hearing Mr. Lehr's squawk box request to Mr. Civitillo, did you do anything else?

A I beg your pardon?

Q I said, after you heard this squawk box communication by Mr. Lehr at around 11:55, did you do anything else?

A After that, Mr. Lehr called me back at between 12:05 and 12:15, and he gave me the lineup. He gave me the lineup, and from the 101 scheduled train, Train No. 802.

Q Is that train listed on this Defendant's Exhibit 1, your train record sheet?

A Yes. This train here.

Q What did you say with respect to that train?

A He said that he was going to bring Train No. 193 into Track 15 to make up Train No. 802.

Q Is 193 also listed on your record sheet there?

A Yes, it is.

Q As an incoming train at 12:19?

A Right. It arrived on that morning at 12:18 on Track 15.

Q So the first thing he told you was that he was going to swing 193 to Track 15?

A To Track 15 for Train No. 903.

Q What was the next track change that he gave you?

A The next track change he gave me was Train No. 1691.

Q What did he say about that one?

A That he would bring that to Track 16 for Train No. 1602.

Q What does 1691 usually arrive on?

A On Track 18.

Q What was the next track change he gave you?

A That he was bringing in Train No. 195 to Track 17 for Train No. 402.

Q What was the next track change after that?

A After that, he gave me Train No. 1601. He was bringing it into 14 for the PJ 146.

Q Did he then continue to give you track changes throughout the rest of the night.

A Yes. He gave me all the changes up to five o'clock that morning, from Train No. 801, the 101.

Q Did he give you any track changes with regard to trains before 101?

A No. He said we wouldplace those by car.

Q Did he tell you at that time what time the

line was going to close?

A No, he did not.

Q Did he say anything about the line at all?

A Yes. We discussed that. I asked him, has he gotten any more information from A Tower. He says no, he doesn't know yet, "But I will get back to you as soon as I get any further information from him.

Q Did he say anything to you with respect to Train 489?

A No, he did not.

Q Did he say anything to you about having trains pulled west?

A No.

Q You say Mr. Lehr called you this time. Did Mr. Lehr call you?

A He called me.

Q He used the dial phone, did he?

A He did use the dial phone, yes.

Q Do you know what Mr. Lehr's practice is with regard to whether he uses the dial phone or the squawk box?

A His practice is to use the dial phone.

Q When does he use the dial phone?

A Whenever he gives me a lineup.

Q After getting this lineup at 12:05, did you have any further communications with Mr. Lehr?

A At about shortly after I spoke to Mr. Lehr then I tried again to contact A Tower, with the same results. Then at sometime around 12:15, approximately then, I called Eddie again and asked him had he gotten any further information from A Tower, and he said no, he hasn't, but he still promised that as soon as he got it, he would furnish it to me.

Q By the way, is it Mr. Lehr's usual practice to call you up and give you a partial lineup?

A To call me up --

Q And give you a partial lineup.

A Yes. This is a general practice. It's getting ahead of things. We feel almost certain that the line will go out by one o'clock, you see. It's a matter of getting ahead on the job. And so we will adjust ourselves to whatever happens in between. But we feel almost certain that the line will go out by one o'clock, so he would give me that lineup.

Q After this 12:15 call by you to Mr. Lehr to find out if he knew when the line was going out, did you have any further communications with Mr. Lehr up until 12:41 that morning?

A Not that I can recall.

Q Did you have any communications with C Tower during this time?

A No.

Q Does your job as assistant stationmaster ever require you to be out of your office?

A Oh, constantly in and out I am, all night long.

Q For what purposes do you leave the office?

A Many different reasons. But on that particular night, we had the 12:11 train which was not moving as fast as I thought it should, and I was getting no response over the radio, and at one time I dashed out to see what was happening on the east end of the platform, and by the time I got down to the platform, they pulled out. And this is like this might be happening all night long.

At one time I went out to show a passenger where her locker was located. I at another time went to the ticket window and gave him a lineup, the change that had been given to me by Eddie.

Another time a passenger called me and stated that he thought he had left his door keys attached to the keys that he opened the locker with and asked me to check

it out and see if he had.

Numerous times --

Q These specific times you referred to, can you place them during the night as to when they occurred, as to when you left your office to perform those duties?

A Well, after that, after about 12:15, from about 12:15 into about 12:25.

Q Let me direct your attention specifically, Mr. Harris, to Train 489. Are you familiar with that train?

A I beg your pardon?

Q Are you familiar with Train 489?

A Yes, I am.

Q When is that scheduled to arrive?

A At 12:22.

Q What time did it arrive that night?

A 12:24.

Q Do you know what track it arrived on that night?

A On Track 17.

Q Is that the track it is scheduled to arrive on?

A Yes, it is.

Q There was no changing of tracks for 489?

1 A No, there was not.

2 Q Do you recall what position Train 489 stopped

3 in?

4 A In its normal position.

5 Q On the east end of the platform?

6 A Yes.

7 Q What happens to Train 489? What does it

8 become?

9 A 489 turns around for Train No. 82, the 12:41

10 scheduled train.

11 Q What line is Train 82 scheduled to depart

12 through?

13 A Normally out of Line 3.

14 Q Was it in its proper position to depart

15 through Line 3?

16 A It was.

17 Q Was it in proper position for Line 1?

18 A No, it was not.

19 Q It was fouling, right?

20 A Yes, this is a fact that I found out later on.

21 Q If it was going to go out Line 1, how much was

22 the train fouling by?

23 A Oh, it was fouling a tremendous amount. It

24 was located in its normal position. As far as we

25

1 understood at that particular time in the office, the
2 stationmaster's office, it was normally loading and was
3 obviously fouling to go out of Line 1.
4 Q It wasn't just a matter of a couple of feet?
5 A No, no, certainly not.
6 Q When 489 was coming in the station, did you
7 radio the engineer to tell him to pull west?
8 A No, I did not.
9 Q Why didn't you do that?
10 A Because I had no knowledge of Line 3 going out
11 of service, or going out of service before that train
12 was scheduled to depart from the station.
13 Q If you knew that the line was going to go out
14 at some point, is there any standard procedure with
15 regard to pulling it west just to make sure?
16 A No, because whenever the line is to go out,
17 A Tower ahead of time tells me or the yardmatser -- not
18 me or the yardmaster, but generally it has been the
19 practice with the yardmaster during the past couple of
20 months, as I stated before, but during normal relation-
21 ship he would tell both of us.
22 Q Between the arrival of 489 at 12:25 and its
23 departure as Train 82 at 12:41, did the yardmaster ever
24 make any reference to about Train 82 as being fouling?
25

Q At that time you didn't know it was going out of service?

A I did not.

Q Any time between 12:24 and 12:41, did you hear the yardmaster make any requests on the squawk box to tell him whether or not the train was fouling?

A No, I did not.

Q Did you see the yardmaster make any effort to have the train pull west between 12:24 and 12:41?

A No.

Q During the time the 11-minute delay was occurring, Train 1691 was due into the station, wasn't it?

A At 12:43.

Q Where does the 1691 usually come in?

A Normally on Track 18.

Q Where had Mr. Lehr scheduled it that evening?

A On Track 16.

Q Was that because Train 1691 was then going to depart as 1602?

A That is correct.

Q When did 1602 depart?

A At 1:11.

Q During the period that 82 was being delayed that 11 minutes, did you have any contact with Train 1691?

A Yes, at about -- well, before that, before that, the moment I realized that 82 was going to be delayed, and naturally it was going to be delayed, and a crew had to come over and pull it west and I said to Vincent ~~Cabapollo~~ Civitello at that moment, "The train on Track 17 is going to have to be pulled west," and he had just told us it had to be pulled west and since it has to be pulled west, if 1691 is around, just bring him right in, I told him.

And then I proceeded to try to get 82 west so that we could get it out as soon as possible.

Q Thereafter, did the engineer of 1691 contact you?

A Yes, he did, at about 12:48.

Q What did he say?

A He asked me as stationmaster how long are we going to sit out here and I responded to him that we would try to get you in as soon as possible, and at that particular moment he indicated that he thought he had gotten the signal but I noticed later on that he hadn't.

At that particular time, since it was my custom, the moment I contact a train coming out of the tunnel, I know he is going to be on the track in thirty seconds, I wrote the time down, 12:48, but he didn't actually arrive at Track 16 at that time.

During this chaotic period, I forgot to change the time there.

Q Did you say anything else to the engineer at Train 1691 when he called you?

A I also told him when he got in to pull west on Track 16 because we had line 3 out of service.

Q Did anyone contact you with regard to the holding of Train 1691 out of the station?

A No.

Q The yardmaster didn't consult you on that?

A No, he didnot.

Q C Tower didn't consult you on that?

A No.

Q As far as you are concerned, Mr. Harris, could Train 1691 have been brought into the station right away as opposed to holding it out in the tunnel?

A Yes, as far as I was concerned.

Q And that's what you told Mr. Civitillo?

A That's what I asked him to do.

Q There was a train behind 1691, wasn't there?

A Train 195.

Q Was that also delayed in arrival?

A Yes, it was.

Q How delayed was that?

A It was delayed, being held in the tunnel behind 1691.

Q Do you recall what time it arrived?

A At 12:57.

Q The reason for that delay was, it was backed up in the tunnel?

A Right.

Q When 1691 pulled into the station, did it pull west at all?

A It did.

Q Did it clear?

A But it didn't clear.

Q By how much didn't it clear?

A It appeared to be 10 or 12 feet off.

Q So it was most of the way west?

A Right.

Q When did you notice that 1691 wasn't in the clear?

A Immediately after it arrived on 16.

Q What did you do when you noticed that it wasn't in the clear?

A I immediately informed the yardmaster and told him to send a crew over to 1691 west.

Q Did you have any communications with the usher with regard to 1691 not being in the clear?

A With who?

Q With your usher.

A Yes, I told Joe to make an announcement 1691 to pull west.

Q Do you know whether he made that announcement?

A No, I don't.

Q Did Mr. Lehr then send a train crew over to pull 1691 west?

A I told him, and he seemed to have because he had faulty communications with the yard crew, he kept trying to reach the yard crew and the yard crew would not respond and I kept asking him, "Have you ever heard from that crew, Eddie, pull the train west, have you heard from them?"

"No, I'm trying to get them."

This went on back and forth and at one time the crew tried to reach him and the crew got no response.

This was a general, seemingly thing that happened from time to time between yardmasters and crews. Communications are faulty and a lot of time is wasted that way.

Q What was the next communication you got from Mr. Lehr with regard to pulling that train west?

A Ww spoke back and forth over the squawk box continually during that period. I kept repeatingly asking him, "When is that crew going to get over there to pull the train west?"

Q When did that occur?

A When I arrived on the job that night, on the night of the 10th.

Q What time did you get to the job that night?

A At 10:43.

Q Who told you that you were -- who asked you to write another report?

A Mr. Jim Bloomfield, assistant trainmaster.

Q What did he say to you?

A Just told me, "Ed, Joe wants a full report on what happened last night."

I said, "What does he want that isn't in the log?"

He says, "Well, tell me what happened."

Then I proceeded to tell him what happened, that without any prior notice, that A Tower took the line away from us at the departure time of Train 82, and that this had been -- it had become a practice of A Tower to just take lines -- I told him this before, take lines and tracks out at will without ever informing me of same.

And he said, "Well, in the report, put that in there."

And he asked me about 1602. I told him about the situation there.

He said, "Well, include that in also. What else

1 happened?"

2 I told him I called 40 office and asked for the

3 trainmaster to call me, asked 40 office to have the train-

4 master paged and call me, and I haven't heard from the train-

5 master yet.

6 I then asked him, "Incidentally, who is the train-

7 master now on this tour for Amtrak, because they have been

8 going through all kinds of changes." You get to the point

9 where you don't know who's Conrail or Amtrak or what.

10 So he says, "Well, frankly, I don't know either."

11 He made a phone call and he got no results with

12 that. And that was the end of our discussion.

13 Q Do you know whether or not you forgot to tell him

14 anything about the events of November 9th and November 10th?

15 A Did I forget to tell him?

16 Q Anything about the events of November 9th and

17 November 10th.

18 A Yes, I had just explained to him the events of

19 the 9th.

20 Q Did you tell him all the facts as you knew them?

21 A Right.

22 Q When did Mr. Bloomfield tell you that Mr. Gaynor

23 wanted the report?

24 A He just said that Mr. Gaynor wants a report by

25

morning.

Q Did he do anything else?

A No. He told me further that, "Well, I'll be around in the station for a little while," and he walked out of the office.

Q Did he give you a pad and pencil and put it down in front of you?

A There was a pad there when I came in.

Q What was the work situation like on the evening of November 10th and the morning of November 11th?

Were there any lines going to go out?

A Yes. That was waiting on me also.

Q What line?

A Line 4 was going out that night, and we had the same notice. Line 4 would go out between the hours of 11 and 7. And indicated the same thing, it meant the same thing, that some time between those two hours, line 4 would go out of service.

Q Thereafter did A Tower contact you on that night as to the time that the line was going to go out?

A Promptly. A Tower on that particular night, shortly thereafter, called me, told me precisely what time Line 4 was going to go out of service, told Harold Tower to close Line 4 off after Train 1689 passes him, and by about

Gaynor during the night of November 10th-November 11th?

A Yes, I did, several times.

Q When did you first sit down and try to write it?

A About 4:30.

Q Were you able to finish the report during your shift?

A No, I was not.

Q Why not?

A Because there were too many things happening. Just before the 3 o'clock grouping of trains -- just after the 3 o'clock group -- let me back up. By the time we got started for the 3 o'clock group of trains to come westbound into the station, trains to come in and make up the 3 o'clock grouping of trains, about twenty minutes to 3, we were informed that Line 3 was going to go out of service. This meant that we had to move certain trains over to the other side of the station so that we could get them out of Line 1.

So we ran all of the trains for the 3 o'clock period out of Line 1 and the Sperry car remained in Line 3 during this period. After all of those trains departed, shortly thereafter, the usher goes to lunch. So I'm left alone there during that period.

And at about 4:15 -- I'm sorry -- at about 3:40, A Tower called me and informed that they had discovered

1 something in Line 3, he didn't know precisely what it was,
2 but he would get back to me on it and let me know precisely
3 just the extent of what they had found.
4 He later on contacted me and told me that they had
5 discovered a broken rail, so be prepared for any kind of
6 difficulties, and they may be in the line longer than he
7 expected.
8 Consequently, the yardmaster and I had to start
9 thinking about the possibilities of the westbound trains
10 coming in for the 5 o'clock group, where to put them, where
11 the line up should be, etc.
12 Q What time does your shift end?
13 A At 7 o'clock.
14 Q At 7 o'clock had you finished the report?
15 A No, I had not.
16 Q Did you try to finish it after your shift ended?
17 A Yes.
18 Q Where did you do that?
19 A Right in the stationmaster's office at the desk,
20 the outer desk.
21 Q Were you successful in that attempt?
22 A No, I was not, because even though the office
23 was then full with other supervisory personnel, the fact
24 that I work as assistant stationmaster there, and everyone
25

knows me, 99 percent of the job there is communications, talking to the crew, where this train is located, what's this car, and various things about the operation, so everyone who walked into the office, they had to interrupt me for one reason or another.

Consequently, I saw that it was hopeless.

Q Did you make any other efforts while you were on the location to finish the report?

A Yes. I then walked out of the office to the usher and policemen locker room. I tried to do it there, but by that time I found that I kept dropping to sleep everytime that I would write two or three lines. So I wasn't successful at that.

Q Did you go home then?

A At that time I decided to, after getting a cup of coffee and trying still to do it and getting no results, I decided to take the 8:10 train home.

Q What if anything did you do when you got home?

A When I got home, shortly thereafter, I called Mr. Lou Rizzacasa and informed him that I would write the report during the day and bring it in with me during that night.

Q What did he say?

A He said okay, he would tell him.

Q By "him," you mean Mr. Gaynor?

A Yes, he said by -- he said he would tell Mr. Gaynor.

Q Did you then go to sleep?

A Yes, after I took a bath I went to sleep, between 10, 10:30, something like that.

Q What happened next?

A Then I slept until about 4 o'clock and after I woke, I went to the bathroom and started to brush my teeth and an inlay which I had been to the dentist prior to and had some work done on, the protective covering came out, the whole thing came out, really, and I had to call the dentist and ask for an emergency appointment.

Q Did you get that?

A Yes, I did.

Q When did you see the dentist?

A I arrived there between the hours of 5 and 6.

Q When did you get back home after the dentist's office?

A At about 7 o'clock.

Q Did you get to write the report then during the day when you were home?

A After the time that I had alotted for the report, it was shot. When I got back home I went back to bed and when I woke up it was just time to have dinner and go to work.

Q On your way to work, Mr. Harris, on the evening of November 11th, what was your intention with regard to that report?

A It was my intention and my hope that things would not be so chaotic that night, that I could still write the report during the morning some time and have the report on Mr. Gaynor's desk when he arrived at 10 o'clock the following morning.

Q Mr. Gaynor is not usually on the job when you come in at all o'clock?

A No, he is not.

Q He usually comes in at 10 o'clock in the morning?

A To my knowledge, yes.

Q Have you ever seen Mr. Gaynor on the job at 11 o'clock, while you have been working at the railroad?

A Never.

Q What time did you arrive at work that night, November 11th?

A I went in on train 187, which arrives at 10:49.

Q Who was in the stationmaster's office when you arrived?

A Mr. Jim McKenna, assistant stationmaster, and Mr. Bloomfield, was walking out of the door, but I could see he was still in the station, walking out of the door as I walked in the door.

q Anybody else?

A We had an usher who was in and out.

Q Was Mr. Gaynor there?

A Mr. Gaynor yes, of course he was there.

Q Were you a little surprised to see Mr. Gaynor there?

A Yes, I was.

Q What happened after you entered the stationmaster's office that night?

THE COURT: We will stop for lunch right now and

ale 1 p.m.

AFTERNOON SESSION

2:20 p.m.

E D W A R D H A R R I S, resumed.

THE COURT: You got Mr. Gaynor there on the night of the 11th.

THE WITNESS: Yes, sir.

DIRECT EXAMINATION RESUMED

BY MR. HOLWELL:

Q What happened when you met Mr. Gaynor there?

A I said, "Good evening," and proceeded to remove my overcoat, and then Mr. Gaynor asked me did I bring the report in with me. I told him I was sorry but I didn't and then I proceeded to explain to him the crisis, dental crisis, and shortly thereafter, he walked out of the office and I relieved Mr. McKenna from the desk, sat down, and then he came back in, Mr. Gaynor, and asked me what happened the night before.

Q What did you tell him?

A I then explained to him what happened, and he said that my story differed from the yardmaster, C Tower and A Tower.

I said, "Well, it is the truth, and as far as A Tower and C Tower are concerned, well, they are one and the same."

on Track 19.

Q But you don't know whether you were in the office at 12:02 wehn 1600 departed?

A No.

Q Now, Train 80, this is the one that you say did not leave on time, that was having trouble departing?

A I didn't say that it didn't leave on time.

Q You said it was -- it wasn't leaving the way you liked.

A I said it was hesitating its departure.

Q What time was this?

A This was at about 12:11, and they closed up and sat for a moment. I tried to reach him on the radio and got no response, and momentarily dashed out of the door, started downstairs, and by the time I got to the platform, he pulled out.

The train still departed on time.

Q So you went down and how long did it take you to get down to the platform?

A It takes a minute or so.

Q How long did it take you to get back up?

A About the same.

Q How did you know, if you were down there at 12:11 on the platform and it takes you a minute or so to get

back up, how did you know that Train 193 passed by Harold at 12:12?

A At 12:12? If I'm not certain of the time that a train is clocked by Harold, then I will ask C Tower, "What time did it come by?"

Q In this case you asked C Tower?

A I don't have to call. We have a direct line to both of us.

Q You speak to him over the squawk box?

A Yes. I'd ask him, "Vinny, what time did 193 come by Harold?"

Q And he arrived at 12:16?

A That's correct.

Q Where were you when he arrived at 12:18?

A When he arrived at 12:18, obviously in the office.

Q Were you also in the office at 12:21 when Train 400 left?

A No, I think I was out of the office when Train 400 left.

Q Where had you gone at that point?

A As a matter of fact, I know I was out of the office right after the 12:18 recording here, a passenger wanted to catch Train 400 and had something in a locker and couldn't locate the locker, and I ran out to show the locker or to find

the locker for the passenger.

Q The wording "Cancelled" there, next to PJ 1230, is that in your handwriting?

A Yes.

Q Do you have any recollection when you wrote that, when you were advised that that train was being cancelled?

A No, I don't.

Q Who would have told you that the train was cancelled?

A Eddie Lehr.

Q And you have no idea when he told you it was being cancelled?

A No, I don't. As a matter of fact, I know it was much later than that because he wasn't certain as to whether he was going to run that train or not.

Q Do you have any recollection between 11:55 and 12:21 of any other specific errands that you went out of the office to perform?

A I went out of the office numerous times during that period. Some specific ones I did is one I just mentioned to you.

Q You helped this passenger?

A Right.

Q That was in regard to train --

A 400.

Q That was in regard to Train 400 leaving at 12:21, right?

A 12:21. At another time I delivered the change of line up to the ticket window.

Q In writing or orally?

A I delivered a sheet in writing to him.

Q Who did you give it to?

A The ticket clerk.

Q What's his name?

A I believe it was Carisello.

Q Were there any other ticket clerks on duty?

A Not at that time, no.

Q There would have only been the one ticket clerk and you gave it to him in writing?

A In writing.

Generally, it is nothing more than a track sheet, which the regular tracks are marked over and the new track listing is stated in that slot.

Q Can you recall any other errands that you left the stationmaster's office for between 11:55 p.m. and 12:21 a.m. on the night of November 5th? Can you recall any other specific errands that you went out on?

A Yes, at one time --

MR. HOLWELL: Excuse me, you mean November 9th.

MR. STOKES: November 9th - 10th.

A At one time a passenger called me and asked me to -- he felt he had left his house keys attached to the keys that he used to open the locker, and asked me to see if he had. He gave me the locker number. I went over to see whether he had or not, but it wasn't there.

Q Who had called you?

A A passenger.

And at one time the usher reported that the light was out on Track 15. I went out to check on that. There could have been many others.

Q This all was happening between 11:55 and 12:21 a.m.?

A No, between that period and about 12:25, thereabouts.

2 Q I am specifically interested between 11:55
3 and 12:21, what happened in there. I am not interested
4 in anything after that.
5 Which are the ones that happened in this
6 period?
7 A The ones I stated to you. Once I went out
8 12:11, checking on the 12:11 train.
9 Another time, to find a locker for a passenger
10 to catch Train 400, and to, also -- to check at one time --
11 no, to deliver the change of tracking to the ticket
12 collector during that period.
13 Q Now, it is your testimony that during this
14 period from approximately 11:45 p.m., November 9th,
15 to 12:21 a.m. on November 10th, you didn't hear any
16 announcement over the speaker system from A Tower that
17 Line 3 would go out after Train 400?
18 A No, I didn't.
19 Q And you say that Mr. Lehr didn't advise you at
20 approximately 12:05 a.m. that Line 3 would go out after
21 Train 400?
22 A He didn't.
23 Q Did Mr. Lehr ask you to advise the crew of
24 Train 489 to pull west on arrival?
25 A He didn't.

Q You never heard Mr. Civitillo at C Tower acknowledge to A Tower that Line 3 would go out after Train 400?

A No, I didn't.

Q You indicated you had made a phone call to A Tower to try and find out the specific time.

Did you make just one phone call?

A No, I made two.

Q When did you make the second phone call?

A One shortly after I spoke to Mr. Lehr at about 11:45, and the next after I spoke to Mr. Lehr at about twelve -- between 12:05 and 12:15.

Q Coming into the other trains, I think we are agreed 1691 turns for 1602; is that correct?

A That is correct.

Q And 1691 is scheduled normally for Track 18?

A That is correct.

Q But in this case, of course, it went into Track 16, right?

A Correct.

Q Now, as I understand, you were in communication with the engineer and conductor of Train 1691?

A Yes, at about 12:48.

Q Did they first communicate with you or you

1 you communicated with them?

2 A They communicated with me.

3 Q To ask why they were being held?

4 A Right.

5 Q And your reply was?

6 A "We'll get you in as soon as possible."

7 Q Then what was the next communication you had

8 with them?

9 A Right following that I asked him, when he came

10 in on Track 16 to pull west and clear the signal to go east

11 out of Line 1.

12 Q Did he acknowledge the receipt of the order

13 in any way?

14 A It was the same conversation. He said okay.

15 Q When 1691 pulled in, as I recall your direct

16 testimony, you recognized right away that it hadn't pulled

17 west sufficiently, is that correct?

18 A Correct.

19 Q You did that by looking out the window?

20 A Right.

21 Q You could still see part of the train so you

22 knew it hadn't gone far enough west?

23 A Right.

24 Q And what time was that?

25

A That was 12:54.

Q Did you have the usher give any instructions to that crew at at that time?

A I told the usher to announce the 1691, to pull west. I also had an SOP, both ushers that work with me, and whenever we have a light that's out of service and a train comes in on 16 and 17, to be ready to, if I miss the person on the radio, he doesn't pull west, to make an announcement all over the station, have him pull west.

Q That was immediately followed along by Train 195, is that correct? Train 1691 was immediately followed in by 195?

A That is correct.

Q And did 195 pull west?

A 195 pulled west. But it, too, didn't --

Q Didn't pull sufficiently far?

A Yes, didn't pull sufficiently.

Q Were you in radio communication with the crew of 195?

A With 195?

Q Yes.

A I tried to get a response from 195, but got none.

normally relieves me.

Q The log books would show who relieved you, wouldn't it?

A Not particularly -- yes, if we look well enough.

Q Actually, it is not important who relieved you. As you left, though, and before you left, you told Mr. O'Brien and Mr. Rizzacasa about the troubles you had had that night, and explained about A Tower, is that correct?

A Right.

Q When you came back in that next night, you say Mr. Bloomfield told you that Mr. Gaynor wanted a report?

A That's correct.

Q Did he explain in any way why Mr. Gaynor wanted a report?

A No, he did not.

Q Did you have only the one conversation with Mr. Bloomfield that night?

A That's all that I can remember.

Q Did he indicate in any way that either he or Mr. Gaynor had conflicting reports or conflicting versions from your version, from C Tower, or from Mr. Lehr?

A No, he did not.

Q So then you relieved Mr. McKenna and took over and you had been advised that Line 4 was going out of service,

What do those letters S mean?

A Simply tells me that when those trains come in we are going to swing them. That means that the yard master will have a crew to move them from whatever track they come in on, swing it over to another track.

Q So that has no reference to the Sperry cars?

A No.

Q Is there any indication on here when the Sperry cars actually started going through the tunnels?

A No, there isn't any indication on here.

Q Do you recall when they started going through the tunnels?

A As I recall, the first one went through, started going through at about 1:05, as I recall.

Q ABout 1:05?

A About 1:05, I believe.

Q What line as that?

A Line 1. A Tower had already called me and informed me of the fact that they would start through Line 1 and would reach us, our tunnels over there, some time in the later part of the morning, and we would exchange our feelings about -- we wre hopeful of the fact that by the time we needed our tunnels for the 3 o'clock grouping, or rather we hoped that we could get through 1:41, which is --

Q You mean between 84 --

A Between 84 leaving at 1:41, before we reached me, and if they had to take Line 3 out, they would take it, or Line 4 out during that period of time, between then and 3 o'clock.

Q What time did they actually reach line 3, do you recall?

A At about 2:40.

Q Did you get any advance notice that they would be reaching there at about 2:40?

A No particular advance notice, other than the fact that there were indications of the movement of the Sperry car through the various lines, indicated that perhaps they would be reaching Line 3 some time during that period.

Q When did you notify 204 of this?

A Notify 204 of the time that we --

Q About the Sperry cars and about the cancellation of Line 4 and about the Sperry cars coming in.

A This was told them right away, the fact that the line 4 cancellation had occurred and that the Sperry car was going through all of the lines for that night.

Q You called 204 and told them?

A I told them, as well as Jimmy Bloomfield told them.

MR. HOLWELL: Your Honor, I would like to object at this point. This doesn't have anything to do with our direct testimony, our direct case. I never heard any allegation that something that Mr. Harris did with regard to this sheet resulted in his being fired from the job the next night.

MR. STOKES: This goes to -- I am trying to find out what Mr. Harris was doing the night he said he was too busy to write the report to Mr. Gaynor.

THE COURT: This was discussion with respect to the Sperry cars. I will allow it.

Q Who did you speak to at 204, do you recall?

A Mr. Jimmy Bloomfield, to be exact. This is the person that reported the fact that the Sperry -- the Line 4 had been cancelled for that night and that the Sperry car would run through all of the tunnels. This was done at about 12:05 somewhere.

Q From the stationmaster's office?

A From the stationmaster's office.

Q At about 2:40, when the Sperry cars reached Line 3, was Mr. Bloomfield still there?

A No, Mr. Bloomfield was not there.

Q Did you call 204 to notify them that the Sperry cars were now going in Line 3 and it was going to be out of service?

A Line 3. I don't recall whether I did that moment or not, but I did inform them that it was out of service.

Q I assume you had prior notice or notice prior to 2:40, that this would be the approximate time it would be arriving?

A Would you repeat that?

Q I assume you had ten, fifteen, twenty minutes notice prior to 2:40 that the Sperry car would be going in the at around 2:40?

A No, this is the time we were told the Sperry car would be going into Line 3, at about 2:40.

Q And at that point, did you work up a new line up with Mr. Lehr?

A Right.

Q And this would have been done somewhere between what, 2:30 and 2:40?

A In that time.

Q What time did you take your luncheon break?

A Shortly right around in that time. I vary with my luncheon break.

Q Would you have taken a luncheon break from 1:40

a.m. to 3 a.m. that night?

A No, I don't take any lunching break during that period of time. I walk out of the stationmaster's office.

Q But it is your testimony you were not absent from the stationmaster's office btween 1:40 and 3 a.m. in the morning for that whole period of time?

A Wait a minute now, excuse me. What is your question?

Q I am asking if you are stating at this time that you were not absent the entire period from 1:40 am. to 3 a.m. from the stationmaster's office.

A I am not saying that. I was in and out of that office during that period of time.

Q You are aware, you are under oath, Mr. Harris.

A I know.

THE COURT: He knows.

Q And that is under penalty of perjury.

A Yes.

Q Just when did you take your lunch break that night? You normally do take a lunch break, during the night?

A Yes, I do.

Q When did you take your lunch break?

A It varies, but it is generally during that period

period from 1:46, after the 1:46 equipment train leaves. It left that night at 1:43 and during that period I, with a radio in my hand, and with the cleaners coming into the office to clean the office, I walk out of the station. That particular time during that period, I walk over to the station check the station, I go to the bathroom, I check various trains if there are any on Track 20 or 21.

Numerous functions during this period of time. During also that same period of time, I get myself a sandwich and have something to eat.

Q Who relieved you that next morning? This would be the morning of November 11th.

A The morning of November 11th, which would be Thursday morning?

Q Yes.

A I think there was Tony -- he is a new man, an extra man, and I don't know his name too well, Tony Costa, or something of that sort.

Q Did Mr. Rizzacasa come in that morning?

A Yes. Mr. Rizzacasa and Mr. O'Brien.

Q And first you tried to write the report there?

A That is correct.

Q And you weren't able to do it and you went then to the usher's room?

A That is correct.

Q Approximately what time would that be?

A That was about 7:30.

Q And how long were you there? Until around 8 o'clock?

A Well, I was in and out. I went there, put my Eureka down, went to the toilet, had a cup of coffee and came -- well, I left there to go home on the 8:10 train.

Q When you were in the usher's room, where were you, at the table?

A Yes, that's correct.

Q And you caught the 8:10 train and approximately what time did you get home?

A Approximately 9 o'clock.

Q What time would you have called Mr. Rizzacasa?

A Shortly thereafter.

Q About five or ten minutes after 9, approximately?

A About that.

Q That night, when you came in and talked to Mr. Gaynor, did he ask you anything about delays to 1691 as well as the delays to Train 82?

A No, he didn't.

Q How about Train 1602, did he ask with respect to that?

MR. HOLWELL: We call Mr. Lehr who is an employee of the railroad.

E D M U N D L E H R, called as a witness on behalf of the plaintiff being first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOLWELL:

Q Mr. Lehr, you are employed by the railroad?

A Yes, sir.

Q How long have you worked for the railroad?

A The Long Island Railroad?

Q That's right.

A For ten years.

Q Before that you worked for the Penn Central?

A Yes.

Q How long did you work for the Penn Central?

A 26.

Q You worked 36 years altogether?

A Right.

Q How many of those years did you serve working as yard master?

A 26.

Q That is the job you hold now, yard master?

A No.

Q Visually. You can tell by asking C-Tower?

A Yes.

Q Can Mr. Harris in the assistant stationmaster's office tell whether a train is 2 feet fouling?

A I don't know.

Q In fact, isn't it true from the assistant stationmaster's office you can only tell if it is fouling if you see part of that train extended in front of you and if you don't see the train in front of you, you know it is west but you don't know if it is far enough west?

A That is right.

Q So even in a situation where the engineer's been contacted, you make it a general practice to make sure on 16 and 17 it is in clear because you will never know whether or not it is fouling by 2 feet or 3 feet because they have to get so far west to get up line 1?

A That is right.

Q By the way, checking with C-Tower on 16 or 17 is part of your job, isn't it?

A Yes.

Q Other than asking C-Tower to check to see whether or not there is a foul, will you also make a visual check of the tracks that you can see?

right?

A Yes.

Q And it departed on track 16?

A Yes.

Q When 1691 got out of the tunnel on its way into New York and was just about to get into the station, was it held out of the station?

A Yes. I held him out. I was waiting for 82 to go out.

Q You held it out, is that right?

A That is right.

Q And it was your decision to hold it out?

A Yes.

Q And you say the difficulty was that you were holding it out because of 82?

A 82, right. I found out he was fouling.

Q When did you find out he was fouling?

A At leaving time.

Q 12:41?

A That is right.

Q Let me ask you whether or not train 1691 which was going to come in on 16 could have come in before train 82 left on 17? Could it have?

A Yes, it could have had.

Q But you decided not to do that?

A No, because I wanted to get 82 out of there not too late.

Q And you decided not to do that, as I recall, because you thought you were going to be able to get 82 out of there within two or three minutes?

A That is right.

Q Actually it took 11 minutes to get 82 out?

A Yes, because the engineer wanted another brake test.

Q So it took a little longer to get out?

A Yes.

Q If you had to do it over again, would you have brought 16 in first?

A I would have brought it on my side.

Q You would have brought 1691 in?

A Yes, on my track, then swing it.

Q If you knew it was going to take 11 minutes to get 82 out --

A I could have brought it in on my side so nothing would interfere with him.

Q Why didn't you do that?

A At the time after a while I asked for 1691 and Vinnie said he had his interlock and with the motor car

1 going out and he didn't want to bring him in.

2 I said, "All right, wait until 82 goes, then

3 bring him in on 16."

4 Q Let me ask you again, forgetting tracks 18,

5 19 or 20 - if you knew that the train on 17, train 82, was

6 going to be 10 or 11 minutes late instead of 2 or 3 which

7 you thought, would you have brought 1691 in first on track

8 16?

9 A Yes, I would have.

10 Q In deciding to hold 1691 out, did you consult

11 at all with Mr. Harris?

12 A No, not that I remember.

13 Q You didn't?

14 A No.

15 Q It was your decision

16 A Yes.

17 Q The delay was your responsibility?

18 A That is right.

19 Q Were there trains caught behind 1691?

20 A Yes, train 195.

21 Q And that was in the tunnel behind 1691?

22 A That is right.

23 Q And the reason 195 was delayed was because it was

24 stuck back there?

25

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rk:mg 21 Lehr-direct

A Yes.

Q And that had nothing to do with Mr. Harris?

A No.

MR. STOKES: Objection.

Q Did Mr. Bloomfield or Mr. Gaynor ask you whether or not it was you that decided to hold 1691 out of the station?

A No.

Q And you never told them, I guess, because it was an arriving train and you were not too concerned with arriving trains?

A Yes, I am concerned about arriving trains.

Q But you didn't mention anything to them about it?

A No.

Q After 1691 arrived, and this is the train that is going to go out as 1692, were you ever advised that while 1691 pulled west, it didn't go all the way west?

A Yes.

Q Who told you that?

A Mr. Harris.

Q Did C-Tower advise you of that at all?

A No.

Q What did you do when Mr. Harris advised you of this?

A I sent a crew over to pull it west.

Q Thereafter, did Mr. Harris also advise you that 195, while it pulled most of the way west had not gotten all the way west?

A Yes. I heard him over the PA system.

Q And you heard this after you heard about 1691?

A No, 195 was first.

Q You heard about 195 first?

A Yes. I didn't hear nothing about 1691 until he told me at one o'clock or 1:05.

Q It is your best recollection it was one o'clock?

A Between 1:00 and 1:05.

Q Let me read back to you some of your deposition testimony on page 29, line 4:

"Q When was the first you heard that train was not clear?

"A One o'clock. 195 had come in after him and Mr. Harris told me he wasn't in the clear so he went over and pulled him in the clear.

"Q How did you find out 1691 was not in the clear?

"A Mr. Harris mentioned it that he wasn't in the clear to go out line and it was one o'clock."

Does that refresh your recollection it was one o'clock and not 1:05?

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rk:mq 23 Lehr-direct

A All right, one o'clock.

Q Did C-Tower advise you whether or not Train 195 was in the clear?

A Yes.

Q Hadn't you asked C-Tower earlier in the evening to tell you whenever the line closes to let me know if any trains are not in the clear?

A Yes.

Q You asked C-Tower to do that and that was before the line closed?

A Yes.

Q And C-Tower didn't tell you whether or not 82 was in the clear?

A No.

Q And he didn't tell you whether or not 1691 was in the clear?

A No. Mr. Harris told me.

Q After you heard from Mr. Harris that 1691 wasn't all the way west, what, if anything, did you do?

A I sent a crew over.

Q Sent him over right away?

A Yes.

Q And you say it normally takes three or five minutes to pull them west?

A Yes.

Q The train was delayed, wasn't it?

A Yes, five minutes because when my engineer got over there, he called me up on the phone, the radio phone, and said he couldn't pull it west because the doors were open and they would not close the doors until leaving time.

Q The train crew would not close the doors for your brake crew?

A To pull it west.

Q Did you tell your drill crew to tell the train crew to close the doors and let's get it moved west?

A Yes, I told htem to tell them to close the doors.

Q And they refused to do that.

Do you know if that had anything to do with the fact there were three brakemen on that train and there wasn't any conductor on it?

A I didn't know about that.

Q You didn't know about that?

A No.

Q The train crew, whether it had three conductors or three brakemen or two conductors and one brakeman, if they had followed your directions, would that train have been pulled west and ready to go before departure time?

A Yes.

Q In fact, it would have been ready at 1:03 or 1:05?

A No, maybe 1:07 it couldhave been ready.

Q During the time you were having problems with the train crew for what is now 1602, did you have any contact with Mr. Harris during this time, and that would be between one o'clock when you say Mr. Harris first contacted you and 1:16 when the train left five minutes late?

A No.

Q You didn't have any contact with him at all?

A No.

Q You didn't advise him you were having troubles?

A No, no. I didn't.

Q Mr. Harris didn't have anything to do with the delay of the departure of 1602, did he, the drill crew?

A No, he didn't know he was fouling at the time. The reason for the delay was they would not close the doors.

Q And that wasn't Mr. Harris' fault, was it?

A No.

Q If they had closed the doors, it would have gone out on time?

A Yes, we could have pulled it down, they could have opened it up again and got out.

Q Did Mr. Bloomfield and Mr. Gaynor ever ask you who was the cause of the delay of 1602?

A No. Mr. Bloomfield did. Just that I said - - it wasn't in the clear at the time and we had to pull it west.

Q You didn't tell him anything about the fact that the train crew refused to close the doors?

A Yes. I told him they would not close the doors and we couldn't pull it down.

Q At the same time did you tell him it wasn't Mr. Harris' fault that the train didn't get pulled west on time?

A I didn't mention that, but it wasn't his fault.

Q Did they ask you whether or not it was his fault?

A No.

Q Let me go to Train 82 which was the last one of the evening, I guess. That one arrives as train 49, is that right?

A Yes.

Q It generally arrives on track 17?

A Right.

Q It arrived on track 17 that night?

A That is right.

the platform?

A Yes.

Q And you knew it was on the east end of the platform, right?

A Yes.

Q You say that the decision to close line 3 that night was made by -- let me strike that, I didn't ask you about the night of November 9, 10.

Whose decision was it to close line 3 on the evening of November 9 and the morning of November 10?

A A-Tower.

Q Did you have any discussions with A-Tower about that?

A Yes, at 11:45.

Q 11:45 you called A-Tower?

A Yes.

Q And you say that you then decided to take line 3 out?

A Yes. I gave him a line up and said we decided after the 12:21, 400 goes off of 19, we would take line 3 out.

Q What method of communication did you use?

A On the central. On the dial phone.

Q Now your next communication was when, 11:55, you

say?

A With who?

Q You tell me.

A Yes. On 11:55 over the squawk box, I mentioned to C-Tower and the stationmaster that line 3 would go out after 400 left.

Q Then after that you say you had a dial telephone conversation with Mr. Harris at about 12:05?

A 12:05, right.

Q At 12:05 you gave him a line-up of trains?

A Yes, and also after five o'clock we would play it by ear.

Q After 12:05, getween 12:05 and the time of the departure of train 82 at 12:41, did you have any further discussions with Mr. Harris?

A No.

Q You didn't and you didn't have any discussions with him on either the dial phone or squawk box, right?

A Not after I gave him the line-up.

Q Between 12:05 and 12:41, did you have any discussions with C-Tower with regard to the closing of line 3 or the moving of trains?

A Yes. Around 12:19 Vinnie says that after 400 goes, he is going to put a hold on 19 track for the motor

important communication to Mr. Harris and Mr. Civitillo at 11:55 on the squawk box?

A No.

Q Does this raise in your mind some doubts that at 11:55 you told them when the line was going to go out? Not whether you had a communication, but when the line was going to go out?

A No. I told them.

Q Do you recall, Mr. Lehr, whether or not you had a conversation that very evening with Mr. Tietjen of 204 office and with Mr. Harris at the same time with rgard to thedelay of train 82?

A Yes.

Q You did?

A Yes.

He wanted to know what was the cause of it going out late.

Q Didn't you tell Mr. Tietjen at that time that around 12 o'clock you and A-Tower were in communication, that A-Tower didn't know when the work crews were going to be ready or when you were going to close line 3, and some time after 12 o'clock you and A-Tower then decided what was going to be the last train out of line 1?

A I don't remember that.

Q Let me read to you a portion of the transcript of that conversation which was recorded --

MR. STOKES: I am objecting to the transcript as presented to me. It is different fom the one we have had and had Mr. McGowan check.

If they are going to use one, I prefer an accurate transcript be utilized.

MR. HOLWELL: If we can look at the one sentence I want to read page 2, the middle of the page --

MR. STOKES: There is no correction.

Q Let me read your statement to Mr. Tietjen on that very night.

A All right.

Q "At 12 o'clock he didn't hear nothing as yet. Then I told him at 12 after 400 left, he can have line 3 out. So he said OK but I guess he didn't get the fellows ready until that time."

Does that refresh your recollection whether at 12 o'clock A-Tower did know whether he was going to have the line ready --

MR. STOKES: Objection. He is not referring to A Tower.

THE COURT: The witness has said "No."

A No, we knew before that that the track was going out after 400 left.

Q Let me read the sentence:

"At 12 o'clock he didn't hear nothing yet."

Is that the A-Tower?

MR. STOKES: May I suggest your Honor if the transcript is going to be utilized that it be marked and that it be shown to the witness? Just throwing things out at him --

MR. HOLWELL: The witness is doing fine by himself.

MR. STOKES: Show him the transcript.

THE COURT: You can put in the balance if you like. He asked about it and in the doctrine of completeness you can put in the balance.

MR. STOKES: He's just throwing things out.--

THE COURT: Gentlemen, you are not going to argue with each other. Address the Court and let us not have that. You are competent counsel and know that. Don't talk to one another.

Q The "he" you are referring to is A-Tower, right?

A Yes.

Q And you told him at 12 after 400 left he can have line 3 out. That "he" is A-Tower, right?

A That's right.

Q Talking to him at 12 o'clock or sometime there-

after?

A No, talking to who?

Q A-Tower.

A No, I talked to him 11:45.

Q You are saying you didn't talk to A-Tower at 12 o'clock or thereafter?

A No.

MR. STOKES: Your Honor, I object to any further questions unless the witness be shown the transcript. He is obviously confusing him at this point. Unless the witness can see --

MR. HOLWELL: I have no further questions.

MR. STOKES: He doesn't know who the he refers to whether it is Mr. Harris or A-Tower.

THE COURT: At 11:45 what did you do?

THE WITNESS: I talked to A-Tower and he made up the whole line up of the trains.

THE COURT: At 11:45?

THE WITNESS: Yes, after 400 left.

THE COURT: What did you do after that?

THE WITNESS: Then I told over the squawk box to C-Tower and the station master that line 3 would go out after 400.

THE COURT: Right after that?

THE WITNESS: About 11:55.

MR. STOKES: The point is, your Honor, Mr. Holwell is very obviously trying to throw what he claims are inconsistent subsequent statements and the witness hasn't seen it and doesn't know who he refers to, unless he sees it. It is just tricky questions from counsel.

MR. HOLWELL: The witness identified --

THE COURT: Don't talk to one another, there is no necessity to argue with the lawyer. You made your objection and that is not necessary.

Q Let me retrace your statement.

"So he said okay but I guess he didn't get the fellows ready until that time."

The fellows are the work crew?

A Yes.

Q Your recollection of that 11:55 conversation, if I told you, Mr. Lehr, that there was testimony that there was a conversation about 11:55 but the substance is youwere on the squawk box to C-Tower and said, "Vinny, let me know if there are any trains fouling after that line closes" and Mr. Harris said, "Yes, I second that."

Do you remember that?

A Yes.

Q About 11:55, wasn't it?

A I told him line 3 was going out.

Q In the same conversation?

A Yes.

Q Would it affect your recollection if I told you Mr. Civitillo testified under oath he doesn't have any recollection of your contacting him at 11:55 and telling him that the line was going out after 400 left?

A No.

Q It wouldn't affect your recollection?

A No.

Q In this conversation you said you had do you know whether or not C-Tower heard you?

A That I wouldn't know.

Q You don't know whether or not C-Tower heard you because it was on the squawk box?

A That is right.

Q Do you know whether or not Mr. Harris heard you?

A I don't know either.

Q Your best recollection is you don't know whether or not either heard you?

A That is true. Generally they are in their office.

Q But you don't recall any response by either of them to that?

A No.

Q You say you called Mr. Harris at 12:05 and gave the line up?

A Right.

Q Let me show you a copy of a document marked into evidence as Plaintiff's Exhibit 1, which is the station master's record sheet of trains arriving and departing on the evening of November 9 and the morning of November 10.

Do you remember looking at that document at your deposition?

A No.

Q Take a close look at it if you would, Mr. Lehr, and tell me that if you gave Mr. Harris the line up, what was the first train that you mentioned to him?

A 1689.

Q The first train you mentioned, wasn't it 193?

A Let's see. No, it could have been.

Q It was in fact 193?

A It could have been.

Q It was, wasn't it?

A All right, I say yes.

THE COURT: Just don't say it because somebody puts it in your mouth. Do you recall or don't you?

THE WITNESS: I don't recall.

THE COURT: Don't hesitate to say you don't recall.

We are here to hear what you really recall. If you recall something, fine. If you don't recall, don't hesitate to say so.

THE WITNESS: All right.

MR. HOLWELL: Could we take a short break for a few seconds?

THE COURT: All right.

(Recess.)

BY MR. HOLWELL:

Q Mr. Lehr, before we broke I sensed that you weren't quite sure whether or not 1689 or 193 was the first train that you gave a track change for.

A I don't remember.

Q Let me see if I can refresh your recollection.

THE COURT: Would it help to look at the station master's sheet or not?

THE WITNESS: No.

THE COURT: It doesn't help?

THE WITNESS: No.

Q Would it help if I point it out to you that the station master sheet shows 1689 was scheduled to come in on track 19 and came in on the same track 19 and that is no track change?

A No, because this makes 400 out. We were going

to take the tunnel out after that left.

Q You didn't make any mention of 1689? The first train you did mention was 193?

A Right.

Q What did you tell him with respect to 193?

A He was going on 15 track for 802.

Q What time did 802 depart?

A 1:11.

Q The next track change you gave him --

THE COURT: 1:11 or 1:01?

THE WITNESS: 1:01.

Q The next train was 1691, right?

A No, 489. I gave him a line up.

Q What did you tell him about 489?

A Going on 17 and pull it west.

Q It always comes in on 17?

A Right.

Q And you still gave the regular line up? 1689 came in on 19 just like it always does?

A Right.

Q You didn't mention 1689?

A No, because it goes out line 3, mark 400 out.

Q What difference does it make with 489 whether or not it is line 3 or 1 if it still goes out on track 17?

A I am giving the line up.

Q Are you sure you specifically mentioned 489?

A Yes.

Q Let me read to you some of your deposition testimony, Mr. Lehr and ask you if that changes your recollection of the events, this is at page 74 line 8:

"Q Did you mention anything about 489 since that was not changing tracks, that you were just going to pull west?

"A No.

"Q So you did not mention anything specifically?

"A No."

Did I ask you those questions and you gave those answers?

A Yes.

Q Those answers were the truth when you gave them, right?

A Right.

Q So you didn't mention 489 specifically?

A I don't recall.

Q You don't recall, is that your testimony?

THE COURT: When you say you gave the line up, what does that mean?

THE WITNESS: The trains, the way they were

coming in from westbound, line 193.

THE COURT: You gave the line up what time?

THE WITNESS: 12:05.

THE COURT: Did you mention all these trains when you gave the line up?

THE WITNESS: Yes.

Q But you didn't mention 489?

A Yes, I did. It went in on 17 track. I told him pull it west.

Q You specifically told him on 489?

A Right.

Q Even though at your deposition you didn't say anything about 489 because you assumed he was going to pull it west?

A I don't remember about that.

Q Let me read some more of your deposition on page--

MR. STOKES: May I suggest page 72 on his deposition?

MR. HOLWELL: Page 72 precedes 74 I am aware of that.

THE COURT: I recognize that, Mr. Holwell and Mr. Stokes and you are not to talk to one another.

MR. STOKES: I am sorry, your Honor.

THE COURT: You will have the opportunity. I

don't know why you have to do this. You will have an opportunity to go through the deposition.

Q Top of page 74 or 73 line 24 you say you gave him the line up at 12:05.

"A I told him to communicate with the engineers to get everything pulled west. So then I presumed he would tell everybody to go west. If he couldn't get in touch with the engineer he would call and tell they weren't clear and I could have it pulled west.

"Q You mentioned nothing about 489 because there was no change?

"A No."

You weren't lying when you answered that question, were you?

A No.

Q You didn't tell him anything specifically about 489?

A No.

Q What was the next train you gave him?

A After 489?

Q Yes.

A 1691.

Q What did you tell him?

A When he gets on 16 pull west.

Q Anything about track changes on 1691?

A Yes, that he goes on 16 track.

Q Instead of 18 track?

A Right.

Q But you didn't tell him to have 1691 pulled west?

A Yes.

Q Didn't you presume?

A No, I told him don't forget to get him west.

Q Let me read your deposition testimony, page 72, line 18:

"Q What was the next train?

"A 1691 that he was going in on 16.

"Q Just that he was going in on 16?

"A Yes. I figured that he knew that he had to pull west."

Do you remember me asking those questions?

A Yes.

Q And do you remember those answers?

A Yes.

Q That was the truth when you answered those questions?

A Yes.

Q That is the truth now, isn't it?

A Right.

Q After 1691 if you look at the station master's log, what was the next train entry you gave him a track change for?

A 195, 17.

Q Instead of 19?

A Right.

Q After that?

A 1601.

Q What did you tell him about that?

A I asked -- that was going to be a PJ and I asked the tower if I could have 14 track and they gave it to me.

Q I want to go back to the first track change you gave him, the first line up.

The first entry in the line up is train 193, right?

A Yes.

Q You told him it was coming in on 15?

A Right.

Q Did that train depart before or after 1 o'clock?

A After 1 o'clock.

Q Mr. Lehr, I don't question about 12:05 you had a conversation on the dial phone with Mr. Harris at which time you gave him the line up of trains beginning with 193

which departed at 1 o'clock.

But isn't it a fact that when you gave him that line up you still didn't know exactly when that line was going out or what the last train to depart from line 3 was going to be?

A Yes, I did. After 400 left.

Q Do you recall having a conversation -- I guess you already did recall -- do you recall this conversation you had with Mr. Tietjen?

A Yes.

Q Mr. Harris was party to it too? I don't want to confuse you so why don't you take a look at this and I want to direct your attention to page 2, if you turn to page 2.

THE COURT: What is the exhibit number?

MR. HOLWELL: Number 5 I believe -- Exhibit 4.

MR. STOKES: There are a number of changes in that paragraph. I don't know what you are referring to but there are changes.

MR. HOLWELL: I don't have any problem with that. We will read it your way.

Q Let me refer you to page 2 Mr. Lehr down at the bottom. EL are your initials. You said:

"Q At 12 o'clock he" -- that means A-Tower -- "didn't hear nothing as yet. Then I told him" --

Q What did he ask you to write the report about?

A About 82.

Q Any other train?

A No.

Q Just 82?

A Yes.

Q That was the only one?

A As I recall.

Q That is the only one you recall him being interested in?

A That is right.

Q When did you write the report?

A November 11, after the 321 train left. You have an hour in between. There is nothing moving at the time.

Q Who did you give the report to?

A When I got relieved, I took the letter upstairs to Mr. Rizzacasa..

Q What time?

A About 7:15, 7:15. When I got home I called him up and told him I forgot to sign my name.

Q That is why your name isn't on the bottom?

A That is right.

Q Had you ever been on the job when there had been

train delays such as there was on the evening of November 9, the morning of November 10?

A Yes, I have been on the job when there have been delays.

Q Let me ask you if you have ever in your entire career working for the Long Island Railroad, ever been asked to write a report, a written report, about the delay of a train?

A No. After I am relieved, I generally go upstairs and tell them orally what has happened.

Q Have you ever been asked to write a report to Mr. Gaynor about the delay of any train for as long as you have worked on the Long Island Railroad?

A No.

Q In your report, you don't mention train 1691 and 195 because Mr. Bloomfield wasn't interested in those trains?

A No, he just wanted to know what happened to 82.

Q After you gave the report to Mr. Rizzacasa, did you hear anything further with regard to your report? Anybody get back to you about what was in it or wasn't in it?

A No.

Q Anybody complain to you it was incomplete?

A No.

after 400 leaves, he has a hold on 19 track for the work train, track car, rather.

Q In other words, you had communications with C-Tower and it was from C-Tower that you learned when the track gang was ready?

A Right. As soon as 400 left that they would be ready to go out there.

Q In fact, when train 400 left, did C-Tower put a hold on track 19?

A Yes, he did.

Q What is the significance of putting a hold on track 19?

A That nobody can go use that track either way, west or east.

Q And what would be the purpose of that. Who would be the only ones permitted in on that track?

A Just the track car.

Q How did C-Tower communicate this hold to you, over the squawk box?

A Yes, over the squawk box.

Q Anybody in either the stationmaster's office or your office knowing that line 3 was going out of service somewheres along the line, when they heard that hold on track 19, they would know that this means that the work

MR. HOLWELL: We have the tape right here.

MR. STOKES: It is not the original tape.

THE COURT: I would just as soon hear the original, I think it is better.

MR. HOLWELL: We have no reason to believe -- the fidelity is fine but if you prefer to wait --

THE COURT: It may be better than the other but usually I go by the original first and if we have a problem them we can see what else we can do.

Do you have any other witness or is this the last witness?

MR. HOLWELL: No, this is the last witness. We might have a rebuttal witness.

THE COURT: All right. I don't know what the situation is with the criminal trial that is scheduled. It is a one-day trial.

MR. HOLWELL: Your Honor, as to the housekeeping matters, the first thing I think we would just like to place on the record and Mr. Stokes understands how you want to apply the usher job in the terminal, these letters with respect to the understanding that we are not preventing him from so bidding.

MR. STOKES: I so agreed.

MR. HOLWELL: We would like for the record to

We have one other housekeeping matter.

We would like to renew our offer of Mr. Civitello's statement --

THE COURT: We are not going to need that before luncheon recess?

MR. HOLWELL: No.

THE COURT: Remind me again.

MR. STOKES: Mr. Segreto.

J O H N S E G R E T O, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. STOKES:

Q Mr. Segreto, by whom are you employed, and in what capacity?

A I am employed by Amtrak as Train Director.

Q How long have you held that position?

A Approximately five years.

Q Were you on duty the night of November 9, 10, 1976?

A Yes.

Q At what location and what trip and in what capacity?

A I worked the tour of 11:00 p.m. to 7:00 a.m.;

tour location, Penn Station.

Q What is a work sheet or a business sheet?

A A work sheet -- it is the business of the day which pertains to track assignments of trains, extra trains and track work pertaining to tunnels.

Q In other words, this would indicate on any given day as to whether line 1, 2, 3, 4 is going out of service?

A Yes.

Q Do you regularly look at it the first thing when you come in on duty?

A Yes.

Q On the night of November 9 and 10, when you came on duty, what did the work sheet indicate?

A It indicated that line 3 was to go out of service at 11:00 p.m.

Q How do you go about taking line 3 out of service? Who do you contact, who contacts you, what is your general procedure, in other words?

A The general procedure at the beginning of my tour of duty, which would be 11:00 p.m., at 11 o'clock I notify the yardmaster that line 3 would be going out and I ask him if he has an extra NL crew which would be a drill crew.

If he says yes, I notify C-Tower, Harold Avenue.

Q At this point, when you are doing this, do you know the specific time you will be taking the line out of service?

A Approximately, yes.

Q Do you have a general custom as to when you take the line out of service?

A I confer with the yardmaster on 21 track as to what train would be the last train into line 3.

Q Has there been a general practice between you and the yardmaster to do it after a particular train?

A Yes.

Q What train is that?

A Train 400.

Q On this night of November 9 and 10, were you in communication with the Long Island yardmaster shortly after coming on duty?

A Yes.

Q About what time was that?

A At 11 o'clock. Like I say at 11 o'clock I talked to the yardmaster and asked him if he had an NL crew and about 11:45 I talked to Mr. Lehr.

Q The conversation at 11, that was before Mr. Lehr came on duty?

A Correct.

Q At 11:45 when you talked to Mr. Lehr, did he call you or did you call him?

A He called me that night.

Q What was the gist of your conversation?

A The conversation pertained to the lineup of trains and we came to the conclusion that after 400 would leave, that would be the last train on line 3.

Q What did you do next with regard to taking line 3 out of service?

A Approximately 11:55 p.m., I got on the speaker system and informed G-Tower, F-Tower and Harold Avenue, that after Long Island 400 leaves, G-Tower line 3 would be out of service.

Q This was at approximately 11:55?

A Approximaely.

Q Right after you finished talking with Mr.Lehr?

A Yes.

Q Did you receive any acknowledgments from the various towers?

A G-Tower acknowledge me, F-Tower and also Harold.

Q This is all over the speaker system or squawk box system that you communicate with these towers?

A Yes.

Q What happened next as far as your operation in

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A-Tower is concerned regarding line 3? Did you get any information as to the track gang?

A About a quarter after 12 that night I received a phone call that the track gang was ready to move and I got the motor car in position on 19 track to go into line 3.

Q Did you receive any communication from C-Tower in regard to the track gang in line 19?

A Previous to that there I had notified C-Tower. I had asked C-Tower, rather, if 19 track was clear and if it was, to put a hold on 19 track. That is where the track car would be.

Q Did you receive any communication from C-Tower when this was done?

A Yes.

Q About what time would that have been?

A That would have been about 12:20, 12:30.

Q How did you receive this communication, on the squawk box system, or was this over direct line or what?

A It would be over the speaker system.

Q At this point after train 400 had left and your track gang is moving on up, did you make any further announcements in regard to line 3 going out of service?

A I got a hold of C-Tower, F-Tower and Harold

A I had told 40 office-- well, 40 office called me and asked me what was the problem on the east end of the stateion concerning C-Tower and I told him the situation with train 82 blocking the switch so it can go line 1.

Q Did you adivse him you agreed with the yardmaster that much earlier that line 3 would go out of service after train 400?

A Yes.

Q Did you give them any advice as to the amount of communication you had had with various towers or anything?

A Yes.

Q Is this 11:00 p.m. - 7:00 a.m. tour your regular tour in A-Tower?

A Yes.

Q And you worked as train director there for approximately five years?

A Yes.

Q Have you had any prior problems in working with or dealing with Mr. Harris?

A Yes, I had.

MR.HOLWELL: We object to this.

THE COURT: Overruled.

Q What kind of problems have you had?

A About two months ago, two or three months ago, I had an incident wehre I had a new man at JO-Tower who was just recently qualified. I believe it was line 3 that was out of service. The Long Island trains were going on line 1 and Mr. Harris was constantly calling on the phone with JO-Tower and in turn JO had told me he cannot make the moves competently because of the Long Island stationmaster constantly calling him on the phones and harassing him.

Q Did in fact, as a result of this, a couple of errors occur that night?

A Yes.

Q What action did you take?

A The action I took, I called Mr. Harris up on the phone and informed him if he persisted in this manner of harassing the fellow at JO, I was going to turn him into my superiors.

Q Did you actually make any report to your superiors?

A Yes, I did.

Q Now, did you subsequently have any communication with Mr. Gaynor in regard to this incident on November 9, 10?

A Yes. On November 17 he called me at home.

Q And that was the first you had directly communicated with Mr. Gaynor?

A Yes.

Q Your other reports had been to 40 office?

A Yes.

Q Did you have any conversation with 204 in regard to it?

A No.

MR. STOKES: The witness is available.

CROSS-EXAMINATION

BY MR. SOLLIS:

Q Mr. Segreto, I believe you testified that you normally worked the 11 to 7 shift as the A-Tower operator for Amtrak.

A A-Tower Train Director, yes.

Q And you have normally worked that shift since February or March of 1976?

A Yes.

Q In fact, you worked it for about the last five years?

A Yes.

Q When you work, isn't it a fact that Mr. Harris is normally the assistant stationmaster for the Long Island Railroad down in the stationmaster's office?

A To my recollection, yes.

Q So you did have a telephone conversation with Mr. Gaynor on November 12?

A No, it was November 17.

Q In fact, this is the only conversation you have ever had with Mr. Gaynor or any other Long Island Railroad representative concerning a train delay that was not attributable to your own fault, isn't that true?

A Yes.

Q And you have never given a written or oral report concerning the personal fault of a Long Island Railroad employee for the delay of a Long Island Railroad train prior to this instance?

A No.

Q You have been responsible for delays, haven't you, Mr. Segreto?

A I am not infallible.

Q And you have never been disciplined for a delay, have you?

A I have not been disciplined, no. I received reprimands, if that is what you want to know.

Q You have received reprimands?

A Yes.

Q Once again let me go to your deposition, page 55.

1 "Q Have you ever been in any way disciplined for
2 a delay?
3 "A No.
4 "Q No letter,no reprimand, no suspension?
5 "A No."
6 A Pertaining to the Long Island trains, no.
7 That is what this is all about, ins't it?
8 Q Did you speak to anybody else- - I will just
9 jump around a bit.
10 Have you spoken to anybody else concerning your
11 testimony on your examination before trial between the time
12 that deposition was taken and today?
13 A What do you mean by anybody else?
14 Q Any representative of the Long Island Railroad?
15 A No.
16 Q Mr. Segreto, have you ever been informed by
17 any Long Island Railroad personnel or Amtrak personnel
18 that Mr. Ed Harris has complained about you?
19 A No.
20 Q Is it your testimony that Mr. Bloomfield has
21 never spoken to you in this regard?
22 A No.
23 Q Would it refresh your recollection if I told
24 you that Mr. Bloomfield claims that he spoke to the
25

A Yhis is what I do every day.

Q Do you remember whether the train was in its normal position or was it pulled west?

A It was in its normal position which 1691 makes a ten-car stop.

Q Did the train go out on time? What is the scheduling time?

A We are supposed to leave at 1:11 a.m.

Q Did it go out on time that night?

A No, we were about 11 minutes late, approximately.

Q What happened around leaving time to cause the delay?

A There was some question as to who was the conductor, so the senior brakeman which is the only qualified man we had on that went up to the stationmaster's office and called the crew dispatcher and found out that he would be the conductor for that night.

Q Did he then return?

A Yes. He came down approximately two minutes, maybe three minutes after departure time.

Q Before departure time, did you have any communication with the drill crew?

A Yes. They told me that they wanted the train pulled west since we were going out line 1 and we were

1 fouling the switch and it was necessary.

2 Q About what time was this?

3 A About 1:08, 1:09, approximately the same time

4 that my conductor had gone upstairs. I had just lost sight

5 of him when the drill conductor got on the train PA and

6 informed me to take my key out, which I then called the

7 stationmaster and asked if it was possible to make the

8 move with the drill conductor so as to save time.

9 Q What did he say?

10 A He said, "Sure, fine."

11 Q In other words, you called Mr. Harris and said,

12 "Can I make the reverse move?"

13 A He gave me an affirmative on it.

14 Q What was the first communication you had with

15 the drill crew, about two or three minutes before?

16 A 1:08, 1:09, in that vicinity.

17 Q About 1:12, 1:13, the senior brakeman came

18 down?

19 A Right. The doors were closed at 1:13.

20 Q Then what did you do?

21 A I had communication with the drill conductor

22 from Penn Central and informed him upon closing of the

23 doors by my conductor, he would give me three to back up

24 and two to stop, so as to clear the signal on the east end

25

1 A Train 1602.

2 Q Did train 1602 depart on time?

3 A We departed late.

4 Q About how late?

5 A Clocked out at 1:16.

6 Q Approximately what time did you report to your

7 train?

8 A Reporting time, 12:56 a.m.

9 Q What track was that?

10 A Track 16.

11 Q Do you know what previous train the equipment

12 was -- your train was made up from?

13 A No.

14 Q When you reported to that train, do you know

15 whether the equipment was in normal position or had it

16 been pulled west?

17 A It was in a normal position.

18 Q And at some time after you reported to the

19 equipment, you found out it subsequently had to be pulled

20 west?

21 A Yes.

22 Q When you reported to the equipment, did there

23 come a time when you had a problem as to who was going to

24 be the conductor of the train?

25

A Yes.

Q What was the problem?

A Three brakemen were on the job. We had to find out who was the conductor.

Q In other words, the regular conductor for one reason or another had marked off?

A As far as I know, yes.

Q What did you do at this time?

A I went upstairs and called the crew dispatcher to find out who the conductor was going to be for the train.

Q What was the approximate time of this, to your best recollection?

A About 1:08.

Q Did you go up alone or did all three brakemen go up?

A I went up alone.

Q You then called up the crew dispatcher.

Did you have any trouble getting the number or making the call?

A It took me about a minute or so to get the proper extension.

Q Did you have any conversation with Mr. Harris first?

A No.

Q You had a conversation with the crew dispatcher. What did he advise you?

A He told me I was going to be the conductor for that day, train 1602, run 97.

Q Having finished that conversation, what did you do?

A I went down to the train.

Q Approximately how long does it take you to get downstairs?

A No more than a minute.

Q Approximately what time did you get back down there, do you know?

A About 1:13.

Q What happened when you arrived back at your equipment?

A The other brakemen called me and told me we had to close the doors, we were going to be pulled west.

Q So you closed the doors?

A Right.

Q And the train was pulled west and you then departed from line 1?

A Yes.

Q If the equipment had been properly positioned when you got there, would you have been more than two

minutes late in departing?

A Two, two and a half minutes late.

MR. STOKES: Nothing further.

CROSS-EXAMINATION

BY MR. HOLWELL:

Q Mr. Rubin, my name is Holwell, I am one of Mr. Harris' lawyers.

When you say the train had to be pulled west, do you know how far it had to be pulled from where it was when you saw it on the tracks?

A No, I don't.

Q Do you know whether or not it could have been like a half a car length?

A I didn't notice.

Q Did you notice the physical position that the car was in,actually on the track, when you came down? Was it by the stairs? Was it west of the stairs, east of the stairs?

A It was by the stairs.

Q It wasn't east of the stairs?

A Just west of the stairs.

Q It was west of the stairs?

A Yes.

Q You say at about 1:08 you went up to call the

dispatcher?

A That is right.

Q How long did it take you to get up there?

A About a minute.

Q So you got there about 1:09?

A That is about right.

Q And it took you a couple of minutes to get in touch with him?

A Right.

Q And you got back to the train and it was, you say, two, two and a half minutes late because of that mixup?

A Say it again?

Q You made the phone call and you went back down to the train and you say because of the mixup with three brakemen, it resulted in two and a half, three minutes' delay?

A That is what it would have taken, two, two and a half minutes to get out of the station.

Q Could it have been three, three and a half?

A It doesn't take but a minute to get to the phone from the train.

Q If you didn't actually get in touch with the dispatcher until, say 1:10, or 1:11, as opposed to 1:09, would that explain maybe another 30 or 60 seconds?

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A The phone call was recorded and it was timed off at 1:12-1/2.

Q So you got in touch --

A It doesn't take but a minute to get from that phone back to the train.

Q So you got in touch with the dispatcher after the trainwas due to depart, is that right? After its scheduled departure?

A I only know what time I hung up.

Q And you hung up around 1:12-1/2?

A Right.

Q When you went upstairs to call the crew dispatcher, you say you didn't speak to Mr. Harris?

A I don't recollect.

Q You don't recollect?

A No.

Q Were you talking to him at all?

A No.

Q Do you recollect him talking to you at all?

A No.

Q You don't recollect him asking you, "Why didn't you come up before leaving time to find out who was going to be the conductor?"

A No.

so get a crew over there and pull it out."

Q Between 12:05 and 12:41, you didn't have any communications with Mr. Harris?

A No.

Q And anything you said to the contrary was a mistake on your part?

A No.

Q But you didn't have any communications, is that right?

A No.

Q You didn't speak over the course of the night and the morning with any of the lawyers for the railroad about the facts of the case, the substance of your testimony, did you?

A Of 82, you mean? The night of November 9th?

Q Any of the events that occurred on the evening of November 9th or the morning of November 10th?

A No.

Q Do you recall when we took a break yesterday in the middle of your testimony and you went out in the hallway and when you were out in the hallway, Mr. Lehr, were you standing there talking to the counsel of the railroad as well as Mr. Gaynor about the facts of the case?

A No. I just asked them how I did and they said OK.

RECROSS-EXAMINATION

BY MR. STOKES:

Q Mr. Lehr, you did have communications on your squawk box between 12:05 and 12:41 concerning 489 coming into track 17 to turn for 8027

MR. HOLWELL: Object to leading the witness.

THE COURT: I don't know why we keep going back to areas we covered before.

Objection sustained.

We have been over this so many times. There comes a time when cross-examination and redirect has to stop.

We have covered so much ground back and forth, I think we have reached the end of it, really.

Q When you said, Mr. Lehr, in response before that you can make an educated guess, is this only if you walk to the end of the platform?

A Yes.

MR. STOKES: All right.

(Witness excused)

MR. HOLWELL: Your Honor, we have no further witnesses to call on our direct case.

THE COURT: You have rested?

MR. HOLWELL: We would not like to rest yet. We

rk:mg 70

would like to leave the record to place in it, first of all, a statistical analysis of the breakdown by rates on the Long Island Railroad, identical to the one we put into the record in the Outerbridge case.

I would suggest that both parties simply stipulate to putting that piece of evidence which was offered and accepted in Outerbridge into the Harris record.

MR. STOKES: I would like to have a little time to check on that, your Honor.

THE COURT: All right.

MR. HOLWELL: We would like to keep the record open, your Honor, to place an analysis of logbook entries into it along the lines you suggested and, thirdly, we may have a witness on rebuttal.

THE COURT: Rebuttal you always keep open.

MR. HOLWELL: If I could ask you before we put on the next witness, whether the Court has had the opportunity to rule on the discovery motion.

THE COURT: Yes. What are the two documents you want?

MR. HOLWELL: The first document we wanted, I guess, is the fact statements written by Mr. Civitillo which were, as I understand them, verbatim statements of his understanding of certain events on the night of

1 answer "He has equipment trouble and car inspectors are
2 working on it."
3 "Do you have any other equipment you could give
4 to the train in particular?"
5 One, for instance, is train 82 due out of New
6 York 12:41. The equipment for 802 laying on track 16. Train
7 82 is on 17 but we require two minutes to walk the people
8 from 17 to 16, get a brake test, the train goes out six
9 minutes late, instead of 12:13, 14.
10 Q There havebeen specific instances you can recall
11 on this?
12 A I assumed the present position I am in now
13 with the relief chief dispatcher's job around the end of
14 August. I was on the job approximately two weeks when
15 train 82 left 13 minutes late. We had no knowledge of it
16 in Jamaica until the operator at Harold Tower reported to
17 us that the train had not left New York.
18 I called New York and got a hold of Mr. Harris
19 and he told me he has trouble charging his train. I
20 said, "Why don't we put it over on the other equipment,"
21 and that is what they did, but the train left 13 minutes
22 late.
23 Q Are there other specific problems where
24 Mr. Harris has failed to perform as assistant stationmaster
25

that you can recall?

A Approximately two weeks later on the night of - well, that would be September 16.

We had an incident where we were still running our Montauk trains and they were running late and we had train 803, 1605. Because the tunnel work was in progress, we were operating against the current of traffic in line 2 westbound.

We got a 13-minute delay on train 1605. I called over to New York. I got hold of the usher, Mr. Shaler, and I asked him, "Where is Mr. Harris?" And he said, "Right here."

I started to talk to Harris and asked him why weren't these trains split by A Tower? "I was at PD-4 stapling manipulation sheets and yard layup sheets together on orders from my superiors"and I said to him,"If this is the case, don't you think your job as the supervisor of a brand new operator at C-Tower, a fairly new yardmaster down on 21 track, don't you feel at this time that you should be in the stationmaster's office calling the shots they way they are supposed to be?"

He said, "I was told by my superiors that I had to get these things stapled."

And I said, "Your job is not to staple sheets

together, we can give that to an usher, why aren't you in the stationmaster's office where you belong?"

"I was told" --

"But it doesn't really matter what you were told. Why weren't you there to oversee the operation?"

During the course of this conversation, while I am questioning him as to why we didn't split these particular trains, I get this, "Don't you bring in no racial overtones at me."

I said, "There are none intended. There were none inferred. All I am asking you is why the job wasn't done the way it was supposed to be done and why weren't you there sitting overseeing the operation?"

Earlier that evening, the train dispatcher had told him about train 189. Told him he would be operating with ten cars, to pull west. Make sure he cleared the interlocking at C.

The train didn't clear the interlocking at C. The announcement was never made.

According to the crew when they got back, the crew said, "We never got any announcements, we never got any radio broadcast to pull west on 16 to clear the C interlocking."

And then the other incident, as I just stated,

Mr. Harris.

If we had Mr. Gaynor on first, we would know whether this evidence was properly admitted or not. That is what Mr. Gaynor testified to and there is going to be no connection on this and we don't know about other ones, but we will find out if he talked to Mr. Gaynor first.

MR. STOKES: Mr. Gaynor's decision to take Mr. Harris out of service had to be confirmed by Mr. Dixon. Mr. Dixon was very familiar with this incident of Mr. Satter's.

If we had wanted to retain Mr. Holwell to present our case, I am sure the company would have done it.

THE COURT: I know, but he does make a valid objection if what we are getting into, what Mr. Gaynor's reasons were, express reasons for discharging Mr. Harris were certain things and we are now getting into things that Mr. Gaynor never knew about; I think we are off base.

MR. STOKES: Not in this way, your Honor. Mr. Gaynor reports his decision to Mr. Dixon who can overrule it. In this case Mr. Dixon, being familiar with many of these things, he approved it and affirmed that decision, and Mr. Dixon will be a witness here.

I have already indicated to counsel I intend to call Mr. Dixon.

When we get up to Mr. Dixon, that is a little different.

MR. STOKES: Of course the Long Island Railroad Company is a corporation and something like this is a management decision, and while Mr. Gaynor may make the initial decision, ultimately the decision has to be affirmed by higher authority which is Mr. Dixon and Mr. Dixon has knowledge of Mr. Satter's report, and this is one of the things he takes into consideration.

MR. HOLWELL: Your Honor, I don't want to continue this any longer than necessary --

THE COURT: It is all right if we rehash it out to see where we are going, to take a little time.

MR. HOLWELL: Mr. Gaynor has testified at least in the initial instances it was his decision to fire Mr. Harris. He did testify that he never saw this report, had no knowledge of the incident. I would suggest that is going to be true to varying degrees with whoever else the railroad wants to bring in, and I would suggest the proper way for the railroad to get this evidence in, the most efficient way for the Court to hear that evidence, is to put their senior employee on the stand, the fellow who fired him, and find out what his reasons were.

THE COURT: Is it Mr. Gaynor or Mr. Dixon that

A Yes.

Q And of course it goes without saying that he has to be out of the office when he is doing some of these things?

A Yes.

MR. SOLLIS: Nothing further.

REDIRECT EXAMINATION

BY MR. STOKES:

Q In essence, Mr. Satter, your unhappiness the night of the 16th, that was because Mr. Harris failed to notify you promptly and failed to show initiative?

A Yes, you could say that.

MR. STOKES: Nothing further.

THE COURT: You may step down.

(Witness excused)

MR. STOKES: Mr. Civitillo.

V I N C E N T C I V I T I L L O, JR., called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RUBIN:

Q By whom are you employed, Mr. Civitillo?

A Amtrak.

Q In what capacity?

A Block operator.

Q On the night of November 9-10, where were you stationed?

A At C-Tower.

Q On that night, did you learn there was going to be a closing of line 3?

A Yes.

Q When was the first time you learned?

A At a little after 11 o'clock.

Q Who told you?

A Mr. John Segreto A-Tower train director.

Q Did he know at that time what time the line would go out?

A No.

Q When did you learn that line 3 would go out?

A Around midnight and not after 12:21,400's leaving time.

Q What did Mr. Segreto tell you -- who did you learn it from-- from whom did you learn that line 3 would go out?

A Mr. John Segreto, A-Tower train director.

Q What did he say to you?

A "Hold on line 3 after 400 goes off 19 track."

Q Did you repeat that to him?

A Yes, sir.

Q How did he communicate that to you?

A Over a speaker system that can be called a central loudspeaker system.

Q Are there other towers attached to this speaker system?

A Yes.

Q Did they all acknowledge?

A The towers involved at A-Twoer was questioning, did acknowledge, yes.

Q Do you know if this speaker system is also connected to the stationmaster's office?

A Yes, sir.

Q Subsequent to that time, did you hear or make any announcements with reference to the movement of train 489?

A Again, please?

Q After that time-- what is the general procedure when a train comes into Penn Station?

A I will get a report from Harold Tower signifying the train number and the time by Harold. Immediately after receiving the report, I will get on with the yardmaster and ask for a track and the yardmaster will specify the track he desires for the train to enter upon.

Q And you speak to the yardmaster how? How do you speak to the yardmaster?

A I will put on the block line system phone and inform him I have such and such a train.

"Hello, Eddie, train 489."

And he will reply with the track he so desires.

Q Is this a three-way squawk box?

A Yes.

Q Who is the third person on this?

A The people involved is the assistant stationmaster, yardmaster, C-Tower operator.

Q When 489 passed Harold Tower, did he call you? Did Harold Tower notify you?

A Harold Tower made the report.

Q What did you do then?

A I immediately called the yardmaster on the three-way speaker system, notified him that 489 was reported by Harold. He replied 17 track.

Q Do you remember Mr. Lehr stating anything else at that time?

A Yes.

Q What did he say?

A After receiving 17 track from Mr. Lehr, I heard him instruct Mr. Edward Harris, the assistant stationmaster,

to instruct the motorman of 489 to pull west on 17 track to clear the east end.

Q You don't know whether Mr. Harris heard that, do you?

A No, I don't.

Q You did hear it, though?

A Yes.

Q You were in your office at the time?

A Yes, sir.

Q Did you have any other communications with Mr. Lehr with respect to line 3 closing at about that time?

A Yes, sir. Prior to 400 leaving, Mr. Rubin, I informed Eddie Lehr on the three-way speaker system that as soon as 400 goes off of 19 track, I will have MFW equipment coming up from the west end of the station, coming up on 19 track, eventually to go out into line 3 once 400 cleared because the tunnel and the track would be going out of service.

Q This is on the three-way squawk box?

A Yes.

Q Have you had prior experience with line 3 being taken out of service?

A Yes, Mr. Rubin.

Q Is line 3 generally taken out before or after

was coming up on 19. I asked Harold interlocking to please notify me when 400 was going to clear his interlocking so I can notify that to A-Tower.

During that process A-Tower had also been instructing us of the plate card that was eventually going to go into effect for line 3.

Track crews and gang foremen were coming into the tower to prepare themselves for the necessary information before going out into line 3.

Q So you were busy with your paper work?

A Yes, sir.

Q When you first noticed that 82 was fouling to go line 1, what did you do?

A I got on to the three-way speaker system and really just aimed at no one. I just yelled that 82 is not in the clear, get him west.

Q Did you speak to anyone else at that time?

A Yes. I had called up Mr. John Segreto at A-Tower trying to see if I could get 82 line 3 instead of line 1, just to see if I could get it out there, but Mr. Segreto informed me that we have a strict hold on line 3 and he is sory, no way.

Q At that time you knew the power was out?

A Yes, sir, the plate card was in effect.

Q You were trying to see if there was anything you could do?

A If it could be annulled or in any other fashion.

Q What time is train 1691 due in?

A At 12:43.

Q Did 1691 platform at 12:43?

A No, sir.

Q Why not?

A At 12:43, 82 was in the process of being pulled west. 1691 was scheduled for 16 track. At that point I didn't know what time 82 was going to actually depart, so when he did eventually clear, I routed the 82 train towards JO and had to wait for it to clear to crossover so I could safely bring 1691 in for 16 track.

Q Did Mr. Harris specifically tell you at that time to bring 1691 in?

A No, sir.

Q If he had told you, would you have?

A Yes.

Q Has he ever asked you to bring trains in in emergency types of situations?

A No.

Q Have other stationmasters from time to time ever directed you to bring trains in?

A At certain times, yes, if it was as an emergency, if they felt as though there was a need for a train to get into another track; yes, I would comply with that.

Q Was there another train about to enter your interlocking at about that time? In other words, was the track gang ready to go out by that time?

A At the time when 82 train was preparing itself to go out, the track car equipment on 19 track reported "ready" and 82 still had not gone out of the station, so I routed my machine from 19 track to main line 3 and proceeded to MFW equipment to go out into the tunnel to do their job.

Q If 82 had left on time, could you have brought 1691 in?

A Yes.

Q On time?

A Yes, on time or maybe one minute late.

Q Since it was staying out there, you decided to take your track equipment out?

A Right, since 82 was not going east and he had the railroad to go out towards JO, why should I hold three things, three sets of equipment?

Q Do you remember when the track gang did go out?

A Yes.

Q What time?

A The first set of equipment was one piece of track car with one additional piece. That reported in the clear at line 3 at 12:48.

Now, once the switches are aligned from 19 track to main line 3, with permission between me and the foreman on the track car equipment, once we have a mutual agreement, no way I will take railroad away from it. The second piece of track car equipment with two additional pieces on track 19 also went out behind it and he reported in the clear at 12:51 and after that, I proceeded to bring in train 1691 for 16.

Q So if it had not been for the track car equipment going out, 1691 might have come in a couple of minutes earlier?

A Yes.

Q But if 82 left on time, you could have brought him in on time?

A On time.

Q Assuming 82 went out at 12:43 or 44 and you have the track gang equipment sitting on track 19, would you still hold 1691 and 195 out or would you bring it in?

A Assuming 82 went out at :43 or :44, I would have brought in the train.

Q And 195?

A Wait for the clear block on 4 so nothing can interfere, then get the track car equipment out.

Q Have you been on duty in the past when you have had emergency situations or problems with Mr. Harris?

A Yes.

Q Do you generally help each other out?

A We would like to work together. It is best to work together because your eight hours goes smooth and quick.

Q And you do work together with Mr. Harris?

A Yes, sir.

Q Have there been situations in the past when you have alerted him to problems he might not have noticed?

A Yes, I can remember one instance.

Q What was it?

A It was one night during the summer months. I couldn't tell you exactly when. We had a train out at 3:07, train 1604 off 18. Prior to its departing time I just looked at the train and seen no one in the cab. Not even the cab door was open. I just got on the three-way speaker system and said, "Listen, Eddie, I don't know if you know about it or not, but I don't see anybody in the cab." And sure as everything, there was nobody assigned to that train for a motorman, so he went about his job to assign someone

Only if the rear end of the car is exactly at the end of the platform, I can see the train.

Q And the minute it moves off the rear end of the platform, you can't see the train?

A If it goes westward a half car length more, I couldn't be able to visualize that.

Q You could tell whether or not the train was sitting on the east end of the platform?

A If it was flushed against the rear of the platform.

Q If you saw that, you would know that the train wasn't pulled far enough west to go up Line 1?

A Definitely, yes. May I also bring up another point?

Q I think we will let Mr. Rubin do that.

Other than checking visually, what other method do you have?

A My machine in my tower.

Q How do you check whether or not there is a fouling by looking at your machine?

A Restoration of signals and switches.

Q Is there also a signal board?

A There is a model board.

Q You can look at a model board or you could go

over and look at the machine?

A I can look at the machine.

Q Or the model board?

A The model board will not indicate to me that the train is over my crossover switches. On the model board it tells me that there is a train on that particular track, if there is a train.

Q But the machine will tell you?

A The machine, yes.

Q On Track 17 for a train to depart Line 1, it has to be west of Signal 8-R; is that correct?

A That is correct. Also may I add that if there is a train on 16 track, that has to be clear of 10-R.

Q I think that is right.

A It is right.

Q When a train comes in on 17, the moment it comes in on 17, you could tell by looking at your machine if you looked at it, whether or not it was clearing that signal?

A I can immediately see if the train is within the limits of clearance.

Q And there is nothing mechanical you have to do?

A Yes. I have to restore my signals to center.

Q And look at the machine?

A And look at my switches. If the switches light

1 up, evidently the train is in the clear of the switches in
2 question.
3 Q Will a yardmaster generally call you to ask
4 whether or not a train on Track 17 or 16 is in the clear?
5 A He can if he wants.
6 Q Does he usually do that?
7 A It varies to whom I work with.
8 Q How about Mr. Lehr, does he usually do it?
9 A Sometimes he does, sometimes he does not. It
10 varies.
11 Q He usually does not?
12 MR. STOKES: The witness answered the question.
13 THE COURT: Yes.
14 Q Sometimes if a yardmaster does not ask you,
15 you yourself will get on and tell him the train is not in
16 the clear?
17 A If I had seen that the train wasn't in the
18 clear as soon as I see the train isn't in the clear, I will
19 notify the people involved so the train can be pulled west
20 if they want it west.
21 Q That is because it is part of your job as it is
22 part of everybody's job in the railroad to make sure there
23 are no delays?
24 A Let me get something straight. It is not my
25

1 responsibility what these trains -- let me put it this way.

2 It is not my responsibility once a train enters

3 a platform track. My responsibility, Mr. Holwell, is trains

4 within my interlock. Once the rear end of the train passes

5 my tower and goes into the platform, they can do whatever

6 they want with that train.

7 Q And you couldn't care less?

8 A I am concerned, yes, for the safety of my signals

9 and switches; it does not interfere with the circuitry.

10 They could do whatever they want with the train, two cars

11 off or make the train go down in the yard. It isn't my

12 business.

13 Q If the yardmaster calls you up and asks you

14 whether or not it is fouling, you will tell him?

15 A Yes, sir, I try to be as cooperative as possible.

16 Q You are familiar, as I understand it, with

17 Train 1691?

18 A Yes.

19 Q And that was that night's schedule for Track 18;

20 is that correct?

21 A Are you saying that Mr. Lehr said I was to put

22 that train in on 18 track?

23 Q Is it normally scheduled for Track 18?

24 A I am not familiar with the whereabouts of the

25

Q You wouldn't make any assumptions as to when a line is going to close, will you?

A I have no authority to put out a line, period.

Q My question is, you wouldn't make any assumptions as to the time when a line is going to go out?

A I just do what I am told.

Q You will check and find out when it is going to close?

A Unless it is told to me, my question is answered, yes.

Q On the evening of November 9 and 10, 1691 was held out of the station.

A Right.

Q That was your decision to hold it out, right?

A In a way. It was my decision.

Q Did you make the decision to hold the train out?

A Yes, due to --

Q I will ask you why in a second.

A Yes.

Q The reason you held that out --

A You want the reason?

Q I will ask you if this is the reason: The reason you held it out because you had maintenance of way equipment on 19?

1 due in at 12:43.

2 Q You held 1691 out because on the schedule 82

3 is supposed to leave first?

4 A No, but it does have priority over 1961 because

5 it is a conflicting move, Mr. Holwell. You can't go 17 out

6 and 16 inbound. It is virtually impossible.

7 Q What?

8 A To bring 17 out and 16 in, like I stated before

9 in testimony.

10 Q Is it possible to hold 17 in and bring 16 in?

11 A Of course.

12 Q And you didn't do that because you assumed that

13 82 was going to go out right away?

14 A As soon as it got into the clear, Mr. Holwell,

15 I was under the impression it was going to go out as soon

16 as it cleared.

17 Q Did you check with the yardmaster on that?

18 A If it was ready?

19 Q As to whether or not to hold 1691 out or to

20 bring it in?

21 A I didn't check with anybody.

22 Q Did you check with the station master?

23 A No, sir.

24 Q Let me read to you some of your testimony on

25

page 108.

A I don't have my paper here.

Q I will read it to you. Line 14:

"Q So even if the Train 1691 was coming into Track 16, because of the work crews on Track 19, you have delayed it from going into 16 regardless of whether or not 82 --

"A Yes. It may not have been so steep as it was but it would have been delayed three or four minutes more than the arriving time on there."

Do you remember me asking that question and you giving that answer?

A Yes, but I wasn't informed, Mr. Holwell, of my MFW equipment clearing times going into Main Line 3, because remember, I have two pieces of track car equipment.

Q What you are saying is, in your deposition you were mistaken?

A At that time of deposition, Mr. Holwell, I was trying to give you the facts as they were.

Q Were you mistaken as to the facts?

A Now, am I saying that was a mistake?

Q Yes.

A I am saying that was the best of my knowledge at the time of deposition.

Q And it was wrong?

A I am not saying it was wrong. I am saying at the time I thought it was right but now I know different because of my block sheets telling me.

Q So it was wrong?

A See --

MR. RUBIN: Your Honor, the witness has answered.

THE COURT: Yes.

Q Now, you say you decided to let the work train go out at what time?

A The report had the first piece of track car equipment reported in the clear on Main Line 3 at 12:48.

Q I am not sure exactly why you decided to let it go at that time.

A Because 82 had not cleared the crossover switches from 17 Track to go to JO.

Q How did you know that at 12:48?

A Because I am looking at the machine. I am working behind my machine.

Q I know, but I thought you had just said that the reason you held 1691 out was because they were just pulling 82 west and you knew it had just cleared and they were going to go right east out of the tunnel. Now you are saying at 12:48 you didn't know whether it had cleared.

A A signal is displayed. An 8-R signal is

1 displayed off of 17 Track with 7 switch and 5 switch reverse.
2 Now, in order for me to tell if the train is by that signal
3 and within that route, the "R" will disappear on the
4 machine. Looking at that machine, the "R", if it was
5 displayed, the train isn't moving. If it isn't displayed,
6 the train is in motion or took the signal and stopped.
7 Either one of those three.
8 Q So at 12:48, did it have the signal to go out
9 Line 1?
10 A Yes.
11 Q At 12:48 Train 82 had the signal to depart?
12 A Yes.
13 Q Even if it had the signal to depart, you sent
14 the work train out?
15 A Yes.
16 Q Let me move back a little earlier in the evening
17 on November 9, November 10. You came on the job what time
18 that evening?
19 A Excuse me.
20 Q What time did you get on the job that evening?
21 A 11 o'clock I started.
22 Q And you became aware the line was going to close
23 sometime that night at 11 o'clock?
24 A Yes, generally.
25

Q And Mr. Segreto told you that?

A That is correct.

Q Thereafter Mr. Segreto told you, you say, that sometime between 12 and 12:21, that there would be a hold on Line 3 after 400?

A That is correct.

Q So that you claim now that you knew before the departure of Train 12, the train at 12:4 -- you are saying the line was going to close?

A You are saying now that I am telling you that I know now I had the hold for 400?

Q Yes.

A I knew from midnight to 12:41 400 would go out. I knew then.

Q And you knew all that night?

A I knew once A-Tower train director made the announcement to all involved that Line 3 was going out after 400 and I acknowledged and understood completely.

Q Do you remember having a telephone conversation a little later that evening with Mr. Tietjen in 204 office?

A Yes.

Q During that conversation he asked you whether or not you knew whether Line 3 was going to go out?

A Yes.

Q And didn't you tell him at that point it was news to you?

A I said that but I was under the impression that Mr. Tietjen, Chief Dispatcher, was telling me that A-Tower told me at 12:21 that there was going to be a hold on Line 3. I knew prior to 12:21 that there was going to be a hold on Line 3 after 400. That is how come I said it is news to me that A-Tower is telling me now at 12:21 there is a hold. I knew way ahead of time.

Q Let me read your conversation there and let me see if we can agree on what it says.

A Yes.

Q (Reading:)

"Q A-Tower told you they were taking Line 3 out around 12:21?

"A A-Tower told me they were going to take out the train about 12:21.

"MR. TIETJEN: Line 3.

"MR. CIVITILLO: That is news to me."

A That is just what I said now. I was under the impression that Mr. Tietjen was telling me at 12:21, A-Tower was saying I had a hold on Line 3 after 400. It wasn't at 12:21 that Mr. Segrego made that announcement.

Q You misunderstood Mr. Tietjen.

A I was implying the question as to me hearing it over the phone that 12:21 I heard A-Tower tell me that Line 3 was going out of service.

Q And what you really meant to say is that you heard before 12:21?

A Yes, but I said that is news because that is what I thought he was implying.

Q You say you heard from A-Tower on the central loud speaker system?

A Of what?

Q With regard to the closing of Line 3?

A Yes, that is correct.

Q And you responded to him?

A Yes. I always will acknowledge A-Tower on any instructions given to me.

Q And this happened before 12:21?

A His announcement?

Q Yes.

A Yes, sir.

Q By the way, Mr. Civitillo, have you had a chance to review the transcripts of your telephone conversation with Mr. Tietjen prior to today?

A Yes, I read that once before, sir.

Q As far as the A-Tower communication, you say

that C-Tower and Harold Tower acknowledged as well as -- rather you and Harold Tower acknowledged that communication?

A Of A-Tower saying that Line 3 was going out after 400, yes, I believe so because A-Tower wouldn't let that slip by. It was very important.

Q That is because if he wants to make a communication and make sure somebody hears it, he will get a response from you that you heard it?

A Of course.

Q You next testified at around 12:18 you heard Mr. Lehr on the squawk box tell Mr. Harris to have Train 489 pulled west?

A Yes. As soon as I reported 489 to Eddie Lehr, he replied 17 and then after that I heard the instructions to Mr. Harris to have the motorman pull 489 west.

Q And you did not hear Mr. Harris reply?

A No, I am sorry I didn't.

Q It is standard operating procedure on the railroad, though, to reply to communications when they are made to you?

A It is nice to have people acknowledge you.

Q It is also good for safety reasons?

A Depending how much of safety you are talking about, right?

Q Right.

Did you tell Mr. Tietjen when you spoke to him later that night that you didn't hear any response from Mr. Harris?

A I made that clearly as possible to Mr. Tietjen that I didn't hear Mr. Harris reply to that instruction and I assumed he was under the impression that he received my message in that conversation.

Q You told him?

A Yes. Mr. Tietjen called me up and asked me.

Q And you told him that you did not hear Mr. Harris respond?

A Yes.

Q You that that was important in order to give a fair picture of what happened?

A No, he asked me.

Q Did you think it was an important piece of information?

A I didn't think of it at the time.

Q But he asked and you told him?

A I answered his question.

Q At the time that Mr. Tietjen called you, you were under the impression that somebody was going to stick you for the train delay?

A That is correct, Mr. Holwell.

Q You were a little --

A Not at the time Mr. Tietjen called me. This happened from the conversation dealing with the dispatcher, not the chief dispatcher. When Mr. Tietjen called me, my blood was at boiling point already because of the prior conversation with the dispatcher.

Q Even though your blood was at a boiling point, you told him you didn't hear Harris respond?

A Was my blood at a boiling point --

Q Even if your blood was at a boiling point, you told him you didn't hear Harris respond?

A He asked me a question. I answered it. It is an easy yes or no answer.

THE COURT: The temperature of your blood did not have anything to do with your giving an answer, did it?

THE WITNESS: No, sir.

Q Now, 489 arrived on Track 17 at 12:24; is that correct?

A That is correct.

Q Did Mr. Lehr at any time ask you during the course of the night to let him know if any trains were fouling on 16 or 17?

A No, sir. If he did make a statement, I didn't

hear it.

Q Your best recollection is he didn't make any statement?

A To my best recollection, I didn't hear any statement, no.

Q Other than asking you generally to let you know if there had been any foulings -- to let him know if there had been any fouling on 16 or 17, did he specifically ask you to check to see whether 489 was fouling?

A No.

Q I assume if he did, you would have checked for him?

A That is correct.

Q When 489 arrived, if you had looked out your window, could you have seen the Train 489 sitting on its position on Track 17?

A Yes.

Q If you had looked at the machine inside your office, could you have told whether or not 489 was fouling on 17?

A That is correct, sir, but dealing with my paperwork, Mr. Holwell, with the "M" forms and the 19 order forms plus the track gang being in my tower, I am not going to turn my whole body around to look at 17 because I was

under the impression the train was being pulled west. That is what Eddie Lehr instructed Mr. Harris to do. I am in operations of the Long Island Railroad. I have to move their trains, divert them. Eddie Lehr determines the track and Mr. Harris deals with crews and other things. If he is asked to do something, you do it.

Q Even if you didn't hear Mr. Harris' response, you knew the train was going to pull west?

A Directly after hearing Track 17 from Eddie Lehr, I went to the machine to make the 4 to 17 route for Train 489.

Q If you had not had all that paperwork that night and if you had not heard Mr. Harris --

A If I hadn't?

Q If you had not -- let me rephrase the question.

A Please.

Q If you had not heard Mr. Lehr ask Mr. Harris on the squawk box to pull the train west, even with your paperwork, you would have either visually checked or checked your machine to tell whether or not it was fouling?

A At that time, Mr. Holwell -- that is an iffy question. I can't speculate because I don't know what I would be doing.

As I said before, when the train comes in, it

comes in. I do not have to deal with that particular train until 12:41. Within that 20-minute gap I was dealing with this particular paperwork and the mutual agreements with the trackmen in question on 19 Track. I can't tell you if I would have looked or not. At that November 10, I did not look. That is all that should be of concern. I didn't look.

Q Let me read to you some of your deposition testimony. On page 84, line 15:

"Q That night you did not do it because you had paperwork and also because you heard the yardmaster tell Harris to pull west?

"A Right.

"Q If you had not heard the yardmaster tell Harris to pull west, would you have done it?

"A Yes.

"Q Normally if you would not have heard that, you would have gone and checked that out?

"A Yes."

Do you remember me asking you those questions and you gave those answers?

A You asked the questions and I gave the answers.

Q And those answers were the truth when you gave them?

A Yes.

Q Are they any different today?

A No.

THE COURT: Why don't we break for today.

MR. STOKES: Your Honor, I had two other short witnesses I was wondering whether your Honor would let us put on.

THE COURT: How short?

MR. STOKES: Not more than about four or five minutes each, your Honor.

THE COURT: Who are they? Maybe they will stipulate on their testimony.

MR. STOKES: They are the engineer and conductor of Train 1691. They are supposed to be working tonight. We took them off tonight and have to pay them and if I have to bring them in tomorrow --

THE COURT: Is there going to be any dispute about their testimony?

MR. HOLWELL: We can't tell until we hear it.

THE COURT: Why don't you step off and put the engineer on right away.

(Witness temporarily excused.)

MR. STOKES: Mr. Quinn.

1 P A T R I C K J. Q U I N N, J R., called as
2 a witness on behalf of the defendant, being first
3 duly sworn, testified as follows:
4 DIRECT EXAMINATION
5 BY MR. STOKES:
6 Q Mr. Quinn, by whom are you employed and in what
7 capacity?
8 A The Long Island Railroad, engineer.
9 Q On the night of November 5, November 10,
10 November 9, were you the engineer of Train 1691?
11 A That is correct.
12 Q Do you recall being held at the home signal?
13 A Yes, I do.
14 Q What time approximately did you arrive there?
15 A 12:43.
16 Q What time did you actually pull into the plat-
17 form?
18 A Approximately 12:53.
19 Q At any time while you were being held on the
20 home signal or up until when you were platform, did you
21 receive any communication by radio or public address system
22 from the assistant station master?
23 A Partially.
24 Q What was that communication?
25

A The first time I had tried to receive the station master, I heard the train No. 1691 and the message came in garbled. Then I proceeded to try and get the station master again and could not get ahold of him.

Q So other than hearing the train No. 1691, did you have any conversation with him?

A None at all.

Q As you pulled into the station platform, was there any announcement on the public address system?

A None at all.

Q Were you listening for it?

A Yes.

Q Was your radio working?

A Yes.

Q How do you know it was working?

A We had intertrain communication.

Q Mr. Quinn, Mr. Harris has testified here, "Then I proceeded to try to get 82 west so we could get it out as soon as possible.

"Q Thereafter did the engineer of 1691 contact you?

"A Yes, he did at about 12:48.

"Q What did he say?

"A He asked me as station master how long we are going to sit out here and I responded to him that we would

1 try to get you in as soon as possible and at that particular
2 moment, he indicated that he thought he had gotten the
3 signal but I noticed later on that he had not. At that
4 particular time since it was my custom the moment I contact
5 a train coming out of the tunnel I know he will be on the
6 track thirty seconds and I write the time down 12:48, but
7 he didn't actually arrive at Track 16 at that time."
8 Do you have any recollection having such a
9 conversation with Mr. Harris?
10 A Not at all.
11 Q At page 109 of the transcript of this, again:
12 "Q As I understand you were in communication with
13 the engineer and conductor of Train 1691?
14 "A Yes, at about 12:48.
15 "Q Did they first communicate with you or did you
16 communicate with them?
17 "A They communicated with me.
18 "Q To ask why they were being held?
19 "A Right.
20 "Q And your reply was, we will get them in as soon
21 as possible. What was the next communication you had with
22 them?
23 "A Right following that I asked him when he came in
24 on Track 16 to pull west and clear the signal to go east
25

1 out of Line 1.

2 "Q Did he acknowledge the receipt of the order

3 in any way?

4 "A It was the same conversation. He said okay."

5 Did you have any such conversation with Mr.

6 Harris?

7 A No.

8 MR. STOKES: No further questions.

9 CROSS EXAMINATION

10 BY MR. HOLWELL:

11 Q You are the engineer on Train 1691?

12 A Right.

13 Q You have radio contact or you at least have a

14 radio that the assistant station master has and the yard-

15 master has?

16 A I have radio communication with them.

17 Q Are you the only one on the train with radio

18 communication or can the conductor --

19 A The conductor and also the two brakemen.

20 Q You could all be in contact with the station

21 master?

22 A Correct.

23 Q Do you know whether or not when you heard someone

24 trying to get in touch with you whether it was the station

25

1 master or not?

2 A Yes, I recognized Mr. Harris' voice.

3 Q Do you know whether or not you said anything

4 back to him over the radio?

5 A I said, can you please repeat that, and there

6 was no answer. Then I said 1691 to the station master,

7 over, and no answer, and I repeated it several times.

8 Q That was the sum and substance of your conver-

9 sation with him on the radio?

10 A That is about it.

11 Q You don't know whether or not he was saying

12 anything to you on the radio, I guess?

13 A There was nothing coming over the radio.

14 Q Because it wasn't working?

15 A Well, after I talked or tried to talk with the

16 station master, I talked to my conductor through the train

17 system which is Channel 3, and we talked to each other

18 perfectly, no problem, very clear and distinct.

19 Q When you were talking to Mr. Harris or Mr.

20 Harris tried to contact you, it was garbled?

21 A The 1691 came in fairly clear but the rest of

22 the message, I could not understand.

23 Q Could that be because when you are speaking to

24 your conductor inside the train, it is a little different

25

or more difficult, maybe, to get radio contact with somebody further away from you?

A I don't really know that much about radio communication so I couldn't tell you.

Q That might be a reason, though?

MR. STOKES: Objection.

THE COURT: Sustained.

MR. HOLWELL: That is all.

THE COURT: You may step down.

(Witness excused.)

MR. STOKES: Your Honor, perhaps we ought to suspend at this time.

THE COURT: Tomorrow morning at 10:00 a.m., gentlemen.

(Adjourned to Wednesday, December 15, 1976 at 10:00 a.m.)

1 that. On the block sheet is the correct thing that hap-
2 pened. At the deposition is just what I am trying to
3 recollect.
4 Remember, I work five different towers each
5 week. Trying to pinpoint what happened when I worked C-
6 Tower that night on leaving times and arriving times, it
7 is kind of hard.
8 I work QFRCN. It ishard to pinpoint for each
9 tower.
10 Q But that is the assumption you were working on?
11 A OK.
12 Q You also said with regard to that conversation
13 with Mr. Tietjen that when he said to you, and A-Tower
14 told you they were taking line 3 out around 12:21, and you
15 responded, "That is news," it was your interpretation of
16 that statement or your interpretation of Mr. Tietjen, you
17 thought Mr. Tietjen was referring to the fact that A-Tower
18 had contacted you at 12:21 to tell you the tunnel was going
19 out at 12:21?
20 A That is what I was getting at,from his conver-
21 sation.
22 Q That is what you were getting at yesterday?
23 A No. At the time of the conversation, that is
24 what I was getting at.
25

A The plate card?

Q Yes.

A The plate card was recited around 12:21 to the time it was put into effect, but I knew damn well before 12:21 that line 3 was going out after that train departed off of 19 track.

Q And you didn't tell Mr. Tietjen that because he was with a foreign railroad?

A Plus after his conversation, minutes prior to that, I had a discussion with the dispatcher and he was coming down strong saying it was my responsibility to pull trains west in Penn Station which is hogwash.

Q OK. Thank you.

How often do you work C-Tower?

A Every Tuesday night of the week.

Q You work it one day a week?

A That is correct.

Q Did there come a time when you wrote a report to Mr. Gaynor?

A Yes, I wrote a report to Mr. Gaynor.

Q When were you asked to write that report?

A I think November 18, Thursday night, while I was at F-Tower.

Q You wrote it while you were on the job?

"Tietjen: What I want to know, Mr. Civitillo, is why you didn't pull 82 west.

"Civitillo: Mr. Tietjen, for one, I could not pull the train west,it is not my job to pull the train west. My job is to get this train into the station. Now I got it in here close to on time. It was by Harold at 12:18 and I got it in here at 12:24. The way the train platforms is none of my business. It didn't stick off the platform. It was in the clear of my interlocking. The only thing that wasn't in the clear were my two crossover switches. It is too close to them over towards JO. That is all I can tell you."

You told Mr. Tietjen it is not your responsibility?

A That is correct.

Q And it is not your responsibility, is it?

A That is correct.

Q Vinnie, you did write a report addressed to Mr. Gaynor on the night of the 18th?

A Yes.

Q And you handed it to me on the afternoon of the 19th?

A That is correct.

Q And you have had a previous conversation with

Mr. Gaynor?

A On the telephone.

Q Could that have been on the 10th instead of the 11th?

A When was Wednesday?

Q It was the 10th.

A Then I am sorry, it was the 10th. Since working nights I never have my dates and times put together.

Q Is this the report you handed to me on the afternoon of the 19th?

A Yes, sir.

MR. RUBIN: Would you mark it for identification.

xx (Defendant's Exhibit H marked for identification)

Q Would you read the first three sentences of this report?

MR. HOLWELL: We object to its use.

THE COURT: Read it to yourself. Not out loud. It is not in evidence.

A All right.

Q On the night of the 9th-10th, you told Mr. Tietjen you heard Eddie Lehr tell Mr. Harris to make sure 480 pulls west?

A My block sheets I reviewed through my representatives.

Q And that is what helped you to remember you spoke to Mr. Gaynor?

A I looked at the block sheet and that is what helped me to remember the specific incident you are bringing to me.

MR. HOLWELL: Nothing further.

THE COURT: You may step down.

(Witness excused)

MR. RUBIN: Mr. Hodges.

J A M E S T H O M A S H O D G E S, called as a witness by the defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RUBIN:

Q By whom are you employed, Mr. Hodges?

A Long Island Railroad.

Q In what capacity?

A Conductor.

Q On the night of November 10, were you conductor on train 1691?

A Yes.

Q When did you arrive at the home signal that

night?

A Approximately 12:42, 12:41.

Q You sat at the home signal for approximately ten minutes?

A Approximately.

Q When is your scheduled arrival time?

A 12:43 in New York.

Q Do you know when you got into New York?

A Approximately ten to twelve minutes late.

Q Let me read to you-- at any time while you were waiting at the home signal, did you have a conversation with Mr. Harris?

A No.

Q Let me read to you from Mr. Harris' testimony at page 54--

MR.HOLWELL: Is it necessary to read it? He testified he didn't have any communication.

THE COURT: He is going to ask him if he heard any such ting. I will permit it.

"Q Thereafter did the engineer of 1691 contact you?

"A Yes, he did, at about 12:48.

"Q What did he say?

"A He asked me as stationmaster how long are we

going to sit out here, and I responded to him that we would try to get you in as soon as possible and at that particular moment, he indicated that he thought he had gotten the signal but I noticed later on that he had not.

"At that particular time, since it was my custom the moment I contact a train coming out of the tunnel, I know he was going to be on the track in 30 seconds, I wrote the time down, 12:48, but he didn't actually arrive at track 16 at that time.

"During this chaotic period I forgot to change the time.

"Q Did you say anything else to the engineer on train 1691 when he called you?

"A I told him when he got in to pull west on track 16 because we had line 3 out of service."

Page 109:

"Q Now as I understand, you were in communication with the engineer and conductor of train 1691?

"A Yes. At about 12:48.

"Q Did they first communicate with you or you communicated with them?

"A They communicated with me.

"Q To ask why they were being held?

"A Right.

"Q And your reply was?

"A We will get you in as soon as possible.

"Q Then what was the next communication you had with him?

"A Right following that I asked him when he came in on track 16 to pull west and clear the signal to go east out of line 3.

"Q Did he acknowledge the receipt of the order in any way?

"A It was the same conversation. He said OK."

Mr. Hodges, did anything of this happen that night?

A NOthing whatsoever. The only conversation I had on that night was with my engineer, with my flagman, who I instructed to try and contact the stationmaster and I spoke to my engineer directly on the radio that we had no communications and he had no communications with anybody why there would be a delay or to pull up on track 16.

There was no communications whatsoever with anybody outside the crew.

Q You did eventually pull into track 16?

A Yes.

Q Did you make a normal stop or did you pull west?

A The same spot we make every night with a car

1 marker stop because we have ten cars and there are markers
2 there.
3 Q Let me read to you part of the testimony on
4 page 56.
5 "Q When 1691 pulled into the station, did it pull
6 west at all?
7 "A It did.
8 "Q Did it clear?
9 "A But it didn't clear.
10 "Q By how much didn't it clear?
11 "A It appeared to be 10 or 12 feet off.
12 "Q So it was most of the way west?
13 "A Right."
14 Did you make a normal stop that night?
15 A We make the stop we make every night where we are
16 supposed to at the ten-car marker that is set up to tell you
17 where to stop.
18 Q You didn't pull all the way west and miss by a
19 couple of feet?
20 A No, we made the normal stop that our train is
21 supposed to make.
22 Q When you got out of the train, did you hear a PA
23 announcement to tell you to pull west?
24 A Nothing whatsoever.
25 MR. RUBIN: No further questions.

about two minutes or so.

Q Do you recall that night where the train that departs at 12:11, departed from what track?

A Track 18.

Q Is that right adjacent to the station master's office?

A Yes.

Q Do you know whether that train departed on time?

A Yes, it did.

Q About what time did you close the gates to that train?

A 12:10.

Q What did you do then?

A I changed the sign and I opened up the 12:20 which is Train 400 which is on Track 9 and I went back into the station master's office.

Q Did you see Mr. Harris come out of the station master's office at any time about departure time of the 12:11?

A No, I did not.

Q Is there any way he could have gone down to the platform on Track 18 at 12:11 coming out of the station master's office without going right by you?

A Not unless he used the front door. There are

two doors to that office.

Q Since you had closed the gate to 18 and if he had gone out the front door, what would he have had to do to get down to Track 18?

A He would have had to have crossed the waiting room and go down the far staircase.

Q That would take more than just thirty seconds or a minute to get down there?

A Yes.

Q Subsequent to Train 400 leaving at 12:21, do you know whether there was any communication from C-Tower that you heard regarding Line 3 being taken out of service?

A No, I did not hear anything.

Q How about at 12:39?

A 12:39 I did, yes.

Q What communication was that?

A C-Tower had called the station master's office to inform us that Train 82 would have to be pulled west.

Q Which track was that on?

A 17.

Q What happened after that?

A Mr. Harris got ahold of the yard master that we needed a drill crew to pull Train 82 west. I looked downstairs. I notified the conductor and the engineer that they

were going to be pulled west, for the engineer to take his key out. You have to have your key out to be able to pull this train west. I notified him and I came back to the station master's office. I called the train out again, then closed the gate.

Q Did you know after this that Mr. Harris attempted to contact 1691 on the radio?

A I did not hear anything.

Q Were you ever given any instructions by Mr. Harris to page the crew of 1691 and tell them to pull the train west?

A No.

Q You were basically present in the station master's office this entire time except for going out to put up a new sign or open or close a gate?

A Yes.

Q Do you know whether 1691 platformed in its normal position or did it platform west?

A Its normal position.

Q Could this be observed both from your booth and the station master's office?

A Yes.

Q They didn't pull part of the way west, did they?

A No.

Q They platformed in their normal position? N-430

A Yes.

Q What train does 1691 turn for?

A 1602.

Q Which departs when?

A 1:10 my time, 1:11 railroad time.

Q Do you know whether it left on time or not?

A It did not.

Q This is because a trainman came up to call?

A There were three brakemen on the train, I believe, and they did not know which one was qualified to take the train out, which one they were moving up as a conductor, so one trainman came up at leaving time, got on the phone and called the crew dispatcher to find out who was going to run the train.

Q Then after he returned to his train, it had to be pulled west?

A Yes.

Q If it had been properly positioned, he could have just gone down and they would have gone out?

A Yes.

Q Just coming back again during this period from 12 o'clock to 12:20 when that 12:11 went out, do you recall seeing any passengers come into the station master's office

to ask questions?

A I don't recall, no.

Q Do you have a practice, you and Mr. Harris, that when he leaves he notifies you?

A Yes.

Q Do you recall his having notified you at any time that he was leaving the station master's office during this period?

A No.

Q Let's go to the next night, the night of November 10 and 11. Were you also on duty that night?

A Yes, I was.

Q That was the night the Sperry cars were running, correct?

A Yes.

Q Do you recall Mr. Harris taking a lunch break that night?

A Yes.

Q Between what hours?

A Around 1:45.

Q When did he return, approximately?

A About 10 to 3, 3 o'clock. More like 10 to 3.

Q It was during Mr. Harris' absence that the Sperry cars were operating in Line 3?

A Yes.

Q About what time did you find out about this, or did you get definite word they were going on Line 3?

A The yardmaster called me about 2:30. He told me that the Sperry car was going into Line 3; that we would have to make track changes. We had tried to work through A-Tower to hold off on taking Line 3 out until we got rid of the 3 o'clock trains. At this time I had worked out the track changes with the yardmaster by putting trains on 15, 16 and 17 because Line 3 was out and we had to move everything over.

Q I show you what has been marked as Exhibit B in this case, Mr. Shearer. That is a station master's train record sheet for the night of November 10-11. Have you seen that before?

A Yes.

Q Are any of the entries on there in your handwriting?

A Yes.

Q Could you specify which ones are?

A Well, there are some here -- I will start from 1:42. That is Train 81 which comes in at 1:48 and then it continues down to 2:32. That is in my handwriting. 2:48. 2:21 got in at 2:27. That was my handwriting. Train

reported 2:26, got in 2:33 and there are a few others on the bottom here. There is one that got in at 2:32, 2:21. Between the hours I would say of 1:48 to 3 o'clock I guess most was in my handwriting.

Q And the reason they are in your handwriting is because Mr. Harris was not in the station master's office?

A Yes.

Q Did you observe Mr. Harris at any time working on a handwritten report?

A Yes, I did.

Q About what time was this?

A About a quarter of 5, 10 minutes of 5.

Q At that point did some problems start to develop in the operations?

A Yes, and he didn't have time to work on the report at that time because we had been in some difficulties and he had to put it aside.

Q Approximately 7 o'clock both you and Mr. Harris were relieved; is that correct?

A Yes.

Q At the time you were relieved, did you see Mr. Harris at all?

A Yes, I did.

Q What was he doing?

A He was entering the activity of the night in a logbook.

Q And this would be approximately what time?

A Around -- well, I leave about 7:05 or so to go get my coffee. It would be anywheres from 7 o'clock to 7:05.

Q Going back to the previous night, the night Line 3 was out of service, your practice is that if Mr. Harris leaves the office, he always tells you so you will man the desk?

A Yes.

Q Do you remember Mr. Harris leaving the office at about 12:20 to help a passenger?

A No, I do not.

Q Did he tell you to man the desk or say anything to you?

A No.

Q Do you remember Mr. Harris leaving the office at about 12:25 to go give a lineup to the ticket clerk?

A No.

Q And he didn't say anything to you to man the desk while he went to see the ticket clerk?

A No.

Q Basically during this whole period, you have no

1 recollection or you don't know that Mr. Harris left that
2 office at all, he was there every time you looked; is that
3 right?
4 MR. HOLWELL: Object to the form of the question.
5 THE COURT: I will permit it.
6 A Yes.
7 Q The only times you were absent would be briefly
8 for a minute to change a sign and open a gate and come back?
9 A Yes.
10 MR. STOKES: That is all I have.
11 CROSS EXAMINATION
12 BY MR. HOLWELL:
13 Q You work as an usher, right?
14 A Yes.
15 Q That means you go out and you put the sign up?
16 A I call the trains. My job is to direct
17 passengers, give information, display signs, call out trains.
18 Q Are you out there -- when a train is loading,
19 are you out there helping them, directing them?
20 A Not necessarily. Most of the time I am in the
21 office. I call out the trains and I am usually in with
22 Eddie.
23 Q And you put the signs up?
24 A Yes.
25

A Mr. McKenna, the assistant station master that had worked the middle trick had a note for Mr. Harris relative to Line 3 going out of service sometime between 11 p.m. of the 9th and 7 a.m. of the 10th. He gave that note to Mr. Harris and verbally informed him of the information in the note.

Q What time was it you left at that point?

A I walked out of the office approximately 10:50. On my way out I had reminded Mr. Harris of Line 3 going out and to keep on top of it.

Q And you then left Penn Station and went home?

A Correct.

Q When did you first hear there had been train delays during Mr. Harris' shift?

A When I came to work the following day, Mr. Gaynor informed me of the fact there were delays.

Q This is in the afternoon of the 10th?

A Right.

Q Did Mr. Gaynor give you any order or directions as to taking any steps in regards to these delays?

A Yes, he did. He told me to talk to Mr. Harris and have him make up a written statement relative to the delays to Train 82, Train 1691, 195 and 1602. He also told me to speak to the yardmaster, Mr. Lehr, relative to the

same train delays and to have Mr. Lehr make up a statement as to what took place and why these delays happened.

Q What time did Mr. Lehr come on duty?

A Mr. Lehr came in around 11:14 of the night of the 10th. I spoke to him between 11:20 and 11:30.

Q What time did Mr. Harris come on duty the night of the 10th?

A He came on duty approximately 10:50.

Q At the time that Mr. Harris came on duty, did you speak to him concerning these delays of the night before?

A Yes, I did. I spoke to Mr. Harris. I told him what was wanted of him, that I wanted him to make a writeup of these delays to the four trains, why it happened. I gave him an order to have this writeup ready for Mr. Gaynor before he left the property to go home the following morning and I asked him several questions about the delays.

Q Did Mr. Harris give you an oral report as to what caused the delays?

A He stated to me that at 12:41 a.m. of the 10th, A-Tower had taken Line 3 out of service without any warning to him and that is what caused the delay to Train 82. I didn't question him any further at that point. I wanted to go down and see Mr. Lehr when he came in. At that time I

1 went down to talk to Ed Lehr about what he had to say and
2 the statement.
3 Q Did you ask Mr. Lehr to give you a written
4 report?
5 A Yes. I told Mr. Lehr to make up a written report
6 for Mr. Gaynor and to have it for him before he went home
7 in the morning.
8 At that time I did question Mr. Lehr about the
9 delays and he told me --
10 MR. SOLLIS: Your Honor, I object to this line
11 of testimony. It is pure hearsay. Mr. Lehr is here. This
12 witness has no personal knowledge of these events and if
13 this testimony is being offered as any probative value to
14 the fact --
15 THE COURT: It is being offered for the truth
16 of what Mr. Lehr said?
17 MR. STOKES: It is being offered basically to
18 show the investigation that Mr. Bloomfield made for Mr.
19 Gaynor and ultimately the information that was available
20 to Mr. Gaynor.
21 THE COURT: It is not being offered for the
22 truth of what actually occurred?
23 MR. STOKES: No.
24 THE COURT: I will receive it on that basis.
25

It is being offered to show what Mr. Gaynor's reasons rather than the actual facts?

MR. STOKES: That is right.

THE COURT: Under the new rules, I believe it is accepted.

MR. STOKES: Where were we, Mr. Reporter?

(Record read.)

A Mr. Lehr told me that at approximately 12:05, he informed C-Tower and Mr. Harris over the speaker system that Line 3 would be going out of service following the departure of Train 400. He stated that he had informed Mr. Harris to make sure when Train 489 came in on Track 17 it was pulled all the way west to clear the 8-R signal.

When I questioned him he told me that when 489 came in, to the best of his knowledge, it was placed properly because Harris did not tell him otherwise. Also, 1691 was held out because no one had ordered C-Tower to bring it in while this delay was taking place with Train 82 and when 1691 came in on Track 16, it was not pulled far enough west and he had to send a drill crew over to pull 1691 west which caused to delay the Train 1602 and Train 195 of course was delayed because it was beyind Train 1691 in Line 4.

At that time I told him to write everything up

and to make sure that Mr. Gaynor had it in the morning and I then left Mr. Lehr's office.

Q Did you write a report to Mr. Gaynor?

A Not at that time. I then talked to Mr. Shearer, the usher that was on duty with Mr. Harris that night. I had asked him questions about if he had heard anything relative to Line 3 going out and approximately what time it might go out --

MR. SOLLIS: I just want to make sure again --

THE COURT: This is not being offered for the truth?

MR. STOKES: It is not being offered for the truth.

THE COURT: Then it is received.

A (Continuing) Mr. Shearer stated to me at approximately 12:05 he had heard Mr. Lehr come over the speaker system and tell C-Tower and the station master's office, Mr. Harris, that Line 3 would go out of service following the departure of Train 400 and that was approximately all he had heard, and at that time I told Mr. Shearer to write up a statement for Mr. Gaynor and leave it for him in the morning.

Q You then sometime on November 10 drew a report up of your investigation to Mr. Gaynor?

A Yes, I did.

Q I show you a two-page document and ask you if that is the report you made to Mr. Gaynor?

A Yes, it is.

MR. STOKES: I show it to counsel and I ask that it be received in evidence.

MR. SOLLIS: Your Honor, I object to the admission of this as an exhibit in evidence. First of all, it was prepared pursuant to an investigation by the railroad. Mr. Gaynor asked Mr. Bloomfield to prepare this report in connection with the investigation. I believe Mr. Bloomfield stated in his deposition at the time Mr. Gaynor asked him to prepare this report, Mr. Gaynor already told him that he had severe doubt as to Mr. Harris' entry into the logbook.

THE COURT: That does not go towards its admissibility.

MR. SOLLIS: It also contains hearsay statements.

THE COURT: I understand all of that. It will be received.

MR. SOLLIS: Is it being offered --

MR. STOKES: On the same basis as the witness' testimony is being offered, to show what basis Mr. Gaynor had when he acted, the information that was available to him.

THE COURT: It will be received.

Q Subsequent to talking to Mr. Lehr and receiving his oral report, did you again talk to Mr. Harris about the delays?

A Yes, I did. I asked Mr. Harris if he was sure that no one had informed him that Line 3 would go out prior to 12:41. He stated very adamantly that no one had informed him and due to his attitude, I didn't pursue the questioning any further. I knew this to be contrary to normal procedure.

Q Did Mr. Shearer give you a written report?

A No. He left a report for Mr. Gaynor that morning.

Q You didn't see that report?

A I have seen it, yes.

Q But you did talk to Mr. Harris again?

A Yes.

Q What was the substance of your conversation with Mr. Harris?

A On the night of the 10th into the 11th, when I talked to him again, I had asked him about the delay of Train 82 and whether he had been informed at what time Line 3 would be taken out and he said no one informed him before 12:41 when it was actually taken out of service. As I said, I didn't pursue the questioning any further because he seemed rather upset that I even asked him.

It is not just about the mental state of Mr. Gaynor.

THE COURT: Not the mental state.

MR. HOLWELL: Also as to what the facts were.

THE COURT: Isn't the claim here that he has been discharged improperly solely on the basis of discrimination?

MR. HOLWELL: And without any cause.

MR. STOKES: According to you, Mr. Holwell. I wouldn't concede that.

THE COURT: Something is going to have to be briefed.

MR. HOLWELL: We have briefed that before.

THE COURT: I want it briefed in connection with this hearing.

MR. HOLWELL: Sure.

MR. STOKES: On what point?

THE COURT: The standards that the Court has to take in connection with the firing of management personnel.

MR. HOLWELL: The legal arguments are twofold. One is the 14th Amendment, whether or not an institution we claim to be a part of the state can remove him without giving him any type of a hearing and, second of all, whether

1 or not he was removed in any event as a result of racial
2 discrimination and as far as the second point goes, I think
3 if we establish that he was fired without due cause, that
4 we certainly have very strong evidence that the second point
5 has been brought home.
6 MR. STOKES: First of all, your Honor, the
7 Sinderman and the Roth cases make very clear -- we will
8 brief that point, but in regard to the last, just what Mr.
9 Holwell says makes it clear why all of this is very germane
10 what was in Mr. Gaynor's mind.
11 THE COURT: I have decided it is admissible.
12 It will be considered.
13 BY MR. STOKES:
14 Q Was Mr. Gaynor present at this point?
15 A At that point, no, he was still outside, he was
16 talking to someone.
17 Q Did he shortly thereafter come in?
18 A Yes, he did. He came in to speak to Mr. Harris,
19 and in view of the fact that Mr. Gaynor was there, I didn't
20 bother questioning him as to why the report I ordered was
21 not there.
22 Q But you remained present during the entire
23 conversation between Mr. Gaynor and Mr. Harris?
24 A Yes, I did. I sent Mr. McKenna out to handle
25

the gate control and I had stayed in while the conversation between Mr. Gaynor and Mr. Harris took place.

Q You weren't in or out or anything, you were standing right there next to Mr. Gaynor and Mr. Harris during the entire time?

A That is correct.

Q And at the conclusion of this conversation, what happened between Mr. Gaynor and Mr. Harris?

A At the conclusion of the conversation, Mr. Gaynor told Mr. Harris that he was relieved of his duties as an assistant station master and that he was to exercise his seniority as an usher and he was to report to Mr. Mezanati in Jamaica to take care of this the next day. At that time Mr. Harris made a remark that rather shocked me. He said he would see us in court. You know what this means, we will be back in court and they will put me back to work.

Q Did you prepare a report to Mr. Gaynor confirming all that you had observed during this conversation?

A No, I did not. Mr. Gaynor said he would prepare a report for Mr. Dixon, the Assistant Superintendent of Transportation, and when it was done, he was going to ask me to read it and witness it.

Q Is this your signature witnessing Mr. Gaynor's report to Mr. Dixon?

A Yes, it is.

MR. STOKES: I ask that this be marked for identification.

xxx (Defendants' Exhibit L marked for identification.)

Q How long have you been working at Penn Station in your present capacity?

A Since January of '76.

Q Have you had occasion to work directly with Mr. Harris during this period?

A Yes, I have.

Q Has he ever made complaints to you about A-Tower, C-Tower, the yardmaster's office, 40 Office or anyone else in a supervisory capacity at Penn Station?

A Yes. He has made complaints about A-Tower.

Q Has he complained about anyone else?

A No.

Q What were the nature of his complaints about A-Tower?

A He stated to me on several occasions when he has tried talking to A-Tower, they didn't answer the phone or that they didn't give him the necessary information he requested.

Q Did you give Mr. Harris any advice or instructions

Q Did anything strike you as being unusual in the log?

A Yes. When I read the log book that morning I saw that Mr. Harris' writeup in the log book had stated that A-tower had taken out Line 3 without no warning at 12:41 A.M. in the morning.

Q Is this normal railroad procedure?

A No, it is not.

Q Is it good railroad procedure?

A No.

Q Now, on that same morning, did you receive a call from your superiors at Jamaica about the delay?

A Yes, I did, I received a call from Mr.Dixon and at this time he told me that I should go ahead and get all the facts which at that time I told him I would.

Q Did he ask you to give a writeup to him?

A Yes.

Q Did you then undertake an investigation?

A Yes, I did.

Q What did you do?

A Well, that morning I contacted Mr. Diaz to see if there was a note and information left for Mr. Harris, that regards to Line 3 getting out somewheres between 11:00 P.M. and 7:00 A.M. in the morning and he aid there

was. So then I proceeded, I went up to 40 office, which is headquarters for Amtrak operations, where I went in and spoke to Mr. DiCataldo, and I believe it was a couple of other Amtrak officials in the 40-office at the time. And I wanted to know why that they had taken out a line without notifying nobody, and there I was told that they had information from the morning from their train director at A-tower that the yardmaster and C-tower and all the towers did have pre-warning before the tunnel would be taken out.

This was done some time around the area of midnight. So with this, I asked him what kind of information they did have at that time. And he said, well, we know the plate order was put out at 12:41, but that the train director had spoken to the yardmaster and also that he had put the hold on Line 3 prior to 400 leaving, telling all the towers, which includes C tower, the stationmaster's office that Line 3 would definitely be out after 400 left.

Q Did you speak to Mr. Bloomfield at all that day?

A Yes, that afternoon, Mr. Bloomfield came in, I told him that I wanted a writeup from Mr. Harris, and Mr. Lehr, and also see if he could get some information

from C-tower and that,as to what had transpired that night. I also spoke to Mr. McKenna when he arrived that afternoon, and I asked him had he definitely talked to Mr. Harris, and that there was a note left that also during the night that that tunnel would be taken out and he says, yes.

Q Did you speak to Mr. Civitillo at all that day?

A Yes, I called Mr. Civitello,that was in the afternoon and I had asked him about taking out, that the stationmaster was made aware that Line 3 would be taken out during the night and he says that their conversations were over through the speaker systems, that after 400 left that night, which came from A-tower to all the towers, including C-tower, and the stationmaster's office, that definitely after Train 400 left that night, Line 3 would be definitely taken out.

And he also told me that he heard in conversation with Mr. Lehr, the yardmaster, telling Mr. Harris over the speaker system,direct line speaker system, that starting with Train 82, all other trains following would go out Line 1 that night, and also, starting with Train 489, when they would come into the station, and everything else after that would have to definitely be

pulled west on 16 and 17 track so they could go out in the opposite direction to Line 1.

Q Mr.Gaynor, you have been in the stationmaster's office, haven't you?

A Yes, sir.

Q Could you briefly explain the system of speakers that are in the stationmaster's office?

A Yes, we have two type systems in there. We have a three-way direct line system which is hooked up between the stationmaster, the yardmaster and C-tower.

Then we have another speaker system in there where A-tower talks to C-tower, the stationmaster, JO, Harold Tower and F-Tower.

Q So that whenA-tower announces to C and F and JO and the other towers that there will be a hold on Line 3 after 400, that information is heard in the stationmaster's office?

A Yes,it is.

Q Have you ever been working in the stationmaster's office when Line 3 was scheduled to go out?

A Yes.

Q Is it the general practice for A to call you on the direct line phone to tell you that the line is going to go out?

A No. This is done strictly usually right through the yardmaster and then we pay attention to the calls coming through the speaker system from A-tower.

Q Has Mr. Harris ever complainted to you in the past that the yardmaster has not communicated with him?

A No.

Q On the morning of November 11th, did you receive the reports that you had requested from Mr. Lehr and Mr. Harris?

A No, I did receive a report from Mr. Lehr, but I did not receive a report from Mr. Harris. I was told by Mr. Rizzacasa, who is a trainmaster working that morning, that Mr. Harris had gone home but did call and say he would make out a report while at home that day and bring it in that night.

Q Did Mr. Lehr leave a report?

A Yes, he did.

Q What was the substance of that report?

A To the fact that he had been told A-tower that line 3 would be taken out after 400, and that he had relayed this information on to the stationmaster and C-tower.

Q Is it the normal practice for the yardmaster to give a lineup to the stationmaster?

A Yes.

Q In giving a lineup would he ever leave out trains?

A No, he would not.

Q Did you receive any calls from your superiors in Jamaica on the morning of the 11th concerning the delays of the 9th?

A Yes, I believe Mr. -- yes, Mr. Dixon did call.

Q What did he say to you?

A He asked me if I had the information to determine the facts as far as the delays and that were from the night of the 9th and 10th of November. I told him that I had most of the information, but I still did not receive the writeup of Mr. Harris.

Q What did he say to you then?

A He told me he wanted that writeup that night and I must get it that night for him.

Q Had you received any other writeups other than Mr. Lehr's?

A Yes, I received one from Mr. Sherer that day, and also from Mr. Bloomfield. The one from Mr. Sherer saying that he did hear over the speaker system at some time around, shortly after midnight, that Line 3 would go out after what train,he couldn't remember what train it

A He says, not only did I request from Mr. Harris a writeup, he says, I give him a direct order, and this is an act of insubordination. He did not comply with it.

Q Did you later receive a writeup from Mr. Bloomfield?

A Yes, I did.

Q Did you request that writeup?

A No, I didn't request a writeup.

Q I show you Defendants' Exhibit J in evidence, and ask if this is the report that you received from Mr. Bloomfield concerning the insubordination of Mr. Harris?

A Yes, it is.

Q When did you receive that?

A I received that off of Mr. Bloomfield some time in the evening of the 11th.

Q What did you do the remainder of that day on the 11th?

A I went on my regular tour of duty, which I handle the operations for the Commission now, which is up till about after 7:00. I guess about 7:30 or so I went out, I had dinner that night. Then I came back to the stationmaster's office some time around ten o'clock that night.

Q You were waiting for Mr. Harris?

A I was waiting for Mr. Harris' report, right.

Q When he came in did he give you the report?

A No, he did not.

Q Did you know of a conversation with Mr. Harris?

A Yes, I did. I had asked Mr. Harris when he come in, did he have the report, and he said no. I says, I asked him how come? And he says that he rather go to the dentist in the afternoon, and he has some more important things to do during the day.

Q Did you ask him why he didn't stay the morning before and write the report?

A I did, yes. I asked him, I says, even if -- I asked him why I didn't get the report the day before and he had told me that he had been too busy through the night to make it.

So I asked him at that time, I said, couldn't he have stayed over and made the report out for that morning, which I didn't get no answer for that.

Q Did you ask him about the facts of the 9th?

A Then I asked him what happened, I asked him first did he receive a note from Mr. Diaz or Mr. McKenna as to the line being taken out between 11:00 P.M. and 7:00 A.M. And he says yes.

I says, did you try to contact A-tower that night?

He said yes, I tried one, but nobody answered.

I said, did you try again?

He said no, I started to get too busy.

So I askedhim, I says, I said, were you aware that Train 4 -- I says, I understand from Mr. Lehr, and Mr. Civitillo and that 40-office that I have information pertaining to the fact that you were made aware through conversation with Mr. Lehr and also the speaker system that Line 3 would go out some time right after 400.

He said at that time, he says, they were liars.

So at this point I says to him, I says, would you kindly tell me what happened that night? I says, weren't you told by -- I brought up the fact again, I says, weren't you told by Mr. Lehr over the speaker system to you that Train 489, when it comes in on Track 7, that it must be pulled west and all other trains that night must be pulled west? I says, and 1691, which followed? I says, weren't you told also that Train 82, which is the first train that turns on the same track from 489 must go out Line 1?

He says no. He says he was not aware of it until A-tower took the line out at 12:41.

Then I confronted him with, I says, well, 1691 came in later, and I says, did you pull him west? At that Mr. Harris didn't answer me.

Q Do you remember him specifically stating that the other people were liars?

A Yes.

Q After you were done speaking about the events of the 9th, did you then tell Mr. Harris anything else?

A I spoke to Mr. Harris and I told him, I says, as far as not getting no writeups from you, and I says, as far as your attitude towards being a manager, I says, has a lot to be desired, and I felt that he was incompetent in handling the job and I told him that the next morning report to Mr. Mezanolti, stationmaster in Jamaica, so he could exercise his rights as an usher, and at this time, Mr. Harris walked over to the door, took his check out, went over, grabbed his coat and as he was walking out, you know what this mean?

I says, no; he says I am going to take you to court and you know that they will put me right back here again.

Q What were the fundamental considerations that you had in mind when you told Mr. Harris to exercise his seniority?

A His attitude, his acts of insubordination, no change in his attitude towards making writeups, his lack of willingness to accept responsibility, and his attitude toward his fellow employees.

Q Did you have in consideration his whole record of past discipllines?

A Yes.

Q Including his insubordination in September of 1975?

A Yes.

Q Is this the first instance in which Mr. Harris failed to submit a writeup when specifically requested?

A No, there have been, since last year, since last December on through now, there have been four or five different occasions where I have requested writeups from Mr. Harris and I never got them.

Q Have any other ASM's referred to given you writeups when asked?

A No.

Q After Mr. Harris left what did you then do?

A I got a hold of Mr. Bloomfield, who was in the office at this time, all this time. I told him to go out and get Mr. McKenna, who is outside supervising our gate control loading, due to a rock concert that night,

and I had come back inside to work the rest of the evening as an assistant stationmaster.

Q By the way, was Mr. Bloomfield present during your entire conversation with Mr. Harris?

A Yes, he was.

Q So Mr. Bloomfield went out and got Mr. McKenna?

A He went out and got Mr. McKenna, brought him back to continue the duties of assistant stationmaster.

Q Did you then have a conversation with anyone else that evening?

A Yes, later on I called, I guess some time -- it must have been after midnight, a little after midnight, I called Mr. Dixon and I told him what happened.

Q And what did he say to you?

A I told him what I had -- I explained to him over the phone and I told him that when I was looking for Mr. Harris' writeup that night to give his explanation as to what transpired, that he did not bring it in. That he could -- that he had to go to the dentist during the day and that he had told me that he had more important things to do when I asked him could he give me an hour or so during the day to make this writeup, to bring it in that night.

Q Did you thereafter write a report for Mr. Dixon?

A Yes, I did.

Q I show you Defendant's Exhibit K marked for identification. I ask you if this is that report.

A Yes, it is.

MR. RUBIN: I move to have it marked in evidence.

MR. STOKES: If I may, your Honor, I had marked that exhibit for identification when I had Mr. Bloomfield on, on his direct examination.

THE COURT: I have it marked for identification. I don't have it in evidence.

Any objection to its being offered in evidence?

MR. SOLLIS: No objection.

THE COURT: Then it is received.

xxx (Defendants' Exhibit K was received in evidence.)

Q When did you write Defendants' Exhibit K in evidence?

A That was right after, some time shortly after that I had relieved Mr. Harris of his responsibilities of assistant stationmaster.

Q Approximately 12:00 to 1:00 o'clock that night?

A Some time right after that.

Q You delivered it to Mr. Dixon on the next day?

A Yes, it was.

Q In your experience as a terminal superintendent at Penn Station, have you ever been on duty when a line was scheduled to go out?

A Yes.

Q What is the responsibility of the station master when this occurs?

A He gets the track changes from the yardmaster and then, in turn, his responsibility is when the train somes into the station that he is required to get ahold of the train, the respective track going in on 17 or 16 with one of the lines out, like 3, to pull the train west of the signals that are in the station there, which would be on 17 track 8-R signal, and on 16 track the 10-R signal.

Q How does he communicate with the train crews?

A Via radio, and if the radio is not working he would contact them with a public announcement, PA system, and if it meant even then if he couldn't get them, then he would go down on the platform and contact them as they came into the track.

Q Is that standard practice to have the drill crew waiting on the platform as the trains arrive to pull them west?

A No way.

you've obviously had an opportunity to hear what Mr. Harris has had to say, as well as the other witnesses who have been called by the railroad so far; isn't that true?

A It's true.

Q Have you listened carefully?

A Most of the time.

Q Good. Good.

Mr. Gaynor, you don't work the same shift as Mr. Harris, do you?

A No, I don't.

Q In fact, you only have seen him at work at the most once or twice since the last time we were here before Judge Gagliardi?

A I think it's only been a couple of times, right.

Q So it would be fair to say that you don't have very much personal knowledge as opposed to what other people may have told you of how the station normally operates between 11:00 and 7:00 when Mr. Harris was normally on duty?

A I have general knowledge of what, how the station works, yes.

Q But, as far as the nuances and so on between 11:00 and 7:00 you are not there, you obviously have --

A I still have general knowledge. I must have

1 this information to Mr. Harris?

2 A No. I have quite a bit of reliance on

3 Mr. Bloomfield, and I know when he tells me he told

4 somebody I know he told them.

5 Q Other than this reliance you are talking

6 about, you have no personal knowledge?

7 A No, I didn't talk to Mr. Harris personally,

8 but I just tell you I do it through my subordinates.

9 Q Now, Mr. Gaynor, as I recall, Mr. Harris

10 said that at times he would ring up A-Tower on the

11 direct line and that A-Tower wouldn't answer, and that he

12 got to the point that he almost gave up trying to talk

13 to A-Tower; isn't that correct?

14 A Yes; I believe he should ring more than once

15 or twice.

16 Q I recall that you told Mr. Morra and Mr.

17 DiCataldo that you would appreciate it if A-Tower also

18 attempted to notify the stationmaster with at least the

19 major information that was being passed on to the

20 yardmaster; isn't that correct?

21 A That's correct.

22 Q And I suppose one of the reasons you made

23 this request was that A-Tower controlled all the movement

24 to and from Pennsylvania Station, and therefore it's

25

it, if you would, in the next question.

Now, is it your testimony that you read Mr. Harris' entry there in the log book which was represented here by Plaintiffs' Exhibit 3?

A Yes.

Q And does it contain his explanation as to what occurred during his shift with respect to those four trains?

A Yeah, there was just mention of the fact that A-Tower took the tunnel out without giving anybody, pre-notice to anybody.

Q You were a bit concerned about that statement that A-Tower had taken the line without any prior notice to Mr. Harris, weren't you, Mr. Gaynor?

A Yes, sir, I was.

Q This claim that A-Tower had taken the line out ofservice without any communication to Mr. Harris disturbed you, among other reasons, becasue this was similar to the complaints that Mr. Harris had raised before concerning communication with A-Tower and the stationmaster's office?

A Yes.

Q In any event, A-Tower's decision to take a track out at 12:41, which is the scheduled departure time of the Long Island Rail Road number 82, would make the

A That's correct.

Q You told me that you were very anxious to get to the bottom of things, isn't that correct, Mr. Gaynor, to talk to as many people as you possibly could to get to all the facts?

A That's correct.

Q. You stated that you spoke to Mr. Dixon around lunchtime of November 10 and you told him that you were starting an investigation into the facts, and you were going to get writeups from Mr. Harris, Mr. Lehr and, if possible, you were going to talk to A-Tower and C-Tower and you were going to do whatever was necessary to really get to the bottom of this matter.

A That's correct.

Q It is your testimony that Mr. Dixon requested a written report from you?

A That is correct.

Q As I recall you told me in your deposition that you were going to get written statements from at least the Long Island Rail Road employees, because whenever there is human negligence leading to a delay of Long Island Rail Road trains you invariably demand a written report.

A If there is a human error, yes.

Q Waiting on your desk also on the morning of November 11 was a copy of Mr. Lehr's statement?

A Yes.

Q I show you a copy of it, as long as we are discussing it. That's Plaintiffs' 5 for identification.

Now, again, you read Mr. Lehr's statement, didn't you?

A Yes.

Q I'm sure you notice at the bottom of that statement that Mr. Lehr states that "1602 wasn't in the clear. The crew went over to pull west but conductor wouldn't close the door until leaving time, causing a delay for 1602."

A That's correct.

Q I recall you telling me that sometime after you had read Mr. Sherer's report and Mr. Lehr's report you got a call from Mr. Dixon on the morning of November 11.

A Yes.

Q And you told me that Mr. Dixon called to find out if you had everything, all the facts and the reports you were going to write, and what caused the delays, and you said to Mr. Dixon, "No, I'm still waiting for the report from Mr. Harris."

A That's correct.

Q You felt that the only thing that was lacking in your investigation was a report from Mr. Harris?

A At that time, yes.

Q In fact, however, at the time of Mr. Dixon's telephone conversation with you on November 11, you hadn't received a report from either A-Tower or C-Tower, had you, Mr. Gaynor?

A No, I didn't, just conversation from 40 office and from Mr. Civitillo.

Q It is your testimony that you had a discussion with Mr. Civitillo prior to this conversation on the telephone with Mr. Dixon?

A I'm talking about in the afternoon of November 10.

Q If I told you that Mr. Civitillo has testified under oath, right in front of you, that he talked to you on the afternoon of November 11, would that refresh your recollection?

A I think it was November 10.

Q You personally hadn't spoken to Mr. Lehr at this time, had you, Mr. Gaynor?

A No, I hadn't.

Q In fact, you never spoke to Mr. Lehr prior to the time that you took Mr. Harris out of service as assistant

MR. SOLLIS: -- if you will bear with me on that, Mr. Rubin.

THE COURT: Why not make it correct? Ask him to exercise his rights.

A Exercise his rights, that's right.

MR. RUBIN: Could you read the last question back, please.

(Record read)

Q Now, there is no mention in Mr. Lehr's report, is there, Mr. Gaynor, of the delays of train 1691 and 495?

A No.

Q There is nothing in that report as to who decided to keep these trains out of the station, is there?

A No, there isn't.

Q Mr. Bloomfield came on duty sometime during the afternoon of November 11, 1976, as I recall your testimony, Mr. Gaynor, and Mr. Bloomfield asked you if you had received Mr. Harris' written explanation concerning the events of November 9 and 10.

A That's correct.

Q And you told Mr. Bloomfield that you had not received any report from Mr. Harris.

A No, I did not.

Q At this point, Mr. Gaynor, you had Mr. Sherer's and Mr. Lehr's statements, you had spoken to Mr. Civitillo on the phone, and the only thing that you felt that was lacking was a report from Mr. Harris?

A Yes.

Q Of course, you had read Mr. Harris' statement in the log book as to why the trains had been delayed.

A Yes, just the two eastbound trains, and the reason why A-Tower took the line out without telling nobody.

Q Now, I'm sure you noticed that Mr. Harris' entry in the log book was about the same length as Mr. Lehr's written statement to you and was about twice as long as Mr. Sherer's statement.

A I didn't take notice of that, really.

Q Well, if I told you that I have counted the words in both --

THE COURT: That's not necessary.

MR. SOLLIS: Are you directing me not to continue?

THE COURT: Yes. Ask the next question.

Q And it seems pretty clear, Mr. Gaynor, doesn't it, that Mr. Harris' story was that neither Mr. Lehr nor C-Tower told them when the line was going out.

A Would you repeat that, please?

Q Yes. In reference to the log book entry --

A Repeat the question, please. Just repeat the question you asked me.

Q Yes.

The question is: it seems pretty clear from that log book entry that I've given you a copy of that Mr. Harris' story was that neither Mr. Lehr nor C-Tower had told him when the line was going out.

A It was self-serving, I believe, too.

Q The answer is that you see that's Mr. Harris' story?

A Oh, yes, I saw that, definitely.

Q The fact is, Mr. Gaynor, that you didn't go home on the evening of November 11 at your normal quitting time, which is 7:00 o'clock; is that correct?

A I left there around 7:30 or so, yes.

Q You went -- this is on November 11?

A That's correct, November 11.

Q You went out for dinner?

A Yes, I did.

Q You came back?

A Yes, I did.

Q And the only reason you stayed around that

evening is to see if Mr. Harris showed up with the written report in his hand?

A That I needed the written report from Mr. Harris is correct.

Q And, of course, you are not normally at the station at this time when Mr. Harris arrives, are you?

A Obviously not, unless there is some kind of an emergency around. There have been times I have.

Q Now, between the time you spoke to Mr. Dixon that morning, November 11, until the time Mr. Harris reported for work on the evening of November 11, did you ever call up Mr. Harris and tell Mr. Harris that, although it was unusual, that you were going to be in the office when Mr. Harris arrived that evening and you expected Mr. Harris to hand over his report to you?

A No, I did not. He had already called Mr. Rizzacasa and told him he was going to bring the report in that night from work. He was going to do it at home.

Q So Mr. Harris walked into the office and you asked Mr. Harris for the written report, and he told you that he had emergency dental work --

A He told me he had -- he didn't have the report, right. I had asked him why he didn't make a report out the night before, and he said he was too busy.

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Q Now, Mr. Gaynor, didn't Mr. Harris tell you that he would give you the report on the morning of November 12 during this conversation?

A No, he didn't tell me that.

Q Well, again I'd like to refer to Mr. Bloomfield's deposition, page 79, and I would refer to lines 13 through 17:

"Q Did Mr. Harris indicate that he planned to write the report during the morning of November 12?

"A He indicated that he would have it in the morning of November 12."

Do you remember that --

A No, I do not.

Q Mr. Gaynor, you told me at your deposition that the reasons you took Mr. Harris out of service that night were, one, train delays and Mr. Harris' refusal to admit his responsibility for those delays; two, Mr. Harris' failure to show up with a written report on the evening of November 11; and, three, his past record.

Do you recall that?

A Yes. Right.

Q You also testified on deposition that his past record, aside from the events of November 9, 10 and 11, in and of themselves weren't enough for Mr. Harris'

being removed from service in your mind.

A Repeat the question, please.

Q Yes.

I said, and you also testified during the course of your deposition that his past record, aside from the events of November 9, 10 and 11, in and of themselves weren't enough for Mr. Harris' being removed from service in your mind.

A Yes.

Q Apparently after you fired Mr. Harris, Mr. Gaynor, it is your testimony that you sat down to write your report to Mr. Dixon.

A I did not fire Mr. Harris. I relieved him of his responsibilities as assistant stationmaster and he was told to go back the next morning to exercise his rights as an usher; correct.

Q I'm sorry, Mr. Gaynor. I said that inadvertently, but your immediate response after that was to start to write your report; is that correct?

A I believe it was sometime later on that evening, yes.

Q Was this before or after you talked to Mr. Dixon on the evening of November 12?

A I don't recall now whether it was when he --

it probably was after when I called him.

Q You didn't tell me you called Mr. Dixon on the evening of November 12, did you, during the course of your deposition?

THE COURT: Was he asked it or not?

MR. SOLLIS: Yes, he was.

THE COURT: Let's do it the way it should be done. Let's have the question and answer. Do it the way it should be done.

MR.SOLLIS: Page 263, line 7 -- starting with line 14 -- line 3:

"Q Did you just work through the night on this, Mr. Gaynor?

"A I believe it was the next morning. Either -- I believe it was the morning of the 12th, I guess.

"Q About what time did you have this written up?

"A I wrote the report the same night.

"Q And what time did you give it to Mr. Dixon in the morning?

"A I believe it was sometime the following morning.

"Q So you normally get in around 10:00?

"A I don't know actually what time. It was sometime the following morning.

"Q And this is the first communication you had with Mr. Dixon?

"A On the writeup, yes."

A I talked to Mr. Dixon on that night at midnight, a little after midnight, on the phone. At that time I didn't think of it, at that time.

Q Now, I'd like to refer you to Defendants' Exhibit K for a few seconds, Mr. Gaynor, so if you'd like to have that before you --

A Is this on the writeup to Mr. Dixon, K?

Q That's right.

You have had a chance to listen to Mr. Civitillo testify, you have heard Mr. Lehr testify, and I would just like to ask you some questions especially in light of their testimony about your report.

This report is inaccurate, isn't it, Mr. Gaynor, when you say in it that both C and Lehr told you that Harris was "made aware" at 12:05 by the yardmaster that 82 would go out line 1? In fact, C-Tower never said anything about the yardmaster calling Harris at 12:05.

A Now, would you repeat the question, please?

Q I'll be glad to.

I say that, I'm asking you, your report is inaccurate, isn't it, when you say in your report that

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dwb-3 Gaynor-cross

A No. But it is not the responsibility of -- the yardmaster checks the fouling.

Q Your answer is there is nothing in your report?

A No, but I am just trying to bring out the report here. You are bringing up the part about fouling.

Q I understand--

A No, let me finish. You brought out the point about fouling. It is not the yardmaster to check to see if that train is fouling. It is the stationmaster who has the actual vision. There in that station, they can look out and see any part of that train. He knows that train is fouling. Now, if C-tower -- the only way he will know it is fouling when it comes like about a minute and a half before leaving time he throws his machine, he sets up the levers on that machine to put a route, and a signal out, and when he goes to throw that lever you are out of business if you don't --

Q Mr.Gaynor, I understand your understanding of how things work, the way things ought to work. My question is there is nothing in your report about Mr. Lehr's request to C-tower that evening that he advise him of fouling?

A No.

Q You don't mention any place in that report ,

if the train directs up there, so he could get hold of them which he does at times, they will call you, he goes strictly business with the yardmaster as far as line changes and the line will go out and they work in conjunction with one another, and they talk to C-tower and in turn the yardmaster talks to the stationmaster.

Q Mr.Gaynor, my question is, there is nothing in your report to that effect, is there?

A No, about A-tower, but the man was already aware of that.

Q This exhibit, Mr.Gaynor, we have just been talking about, Defendants' Exhibit K, this is the detailed writeup that Mr. Dixon had been pressing you for and that you had been so anxious to complete for Mr. Dixon, isn't it?

A Yes.

Q Based on what you told me before, you never would have written this report to Mr. Dixon unless you were completely satisfied that you had exhausted at least the basic sources of information to make sure that you had all the facts, isn't that correct?

A Yes.

Q You felt that it was so important to get this report done that you stayed right there at the office and

you worked on it through the night after taking Mr. Harris out of service?

A Not through the night.

Q Well, you worked on it right after?

A A couple of hours, right.

Q Andyour best recollection is that you either gave this report through Mr. Dixon personally or had hand-delivered to him the following morning?

A Yes,sir, the next morning I gave it to him, right.

Q Youdiscussed the contents of that report with Mr. Dixon,,didn't you?

A Yes.

Q Mr. Dixon said to you in words or substance, "Do you have all the reports?" And you said to Mr. Dixon, Yes.

A Yes.

Q Now, Mr.Gaynor, if you hadn't been sitting there at the station, which you admit was unusual,when the time Mr. Harris came in in the evening of November 11, Mr. Harris could have written that report for you during the normal tour of duty, and you could have written up your report the following morning based on Mr. Harris' report to you, and you could have taken everything up the

1 same way you did to Mr. Dixon on the morning of November
2 12, isn't that a fact?
3 A No, I could not on account of Mr.Dixon gave
4 me a direct order that afternoon, "You get that report
5 tonight." And he is my superior and I listen to him.
6 Q Isn't it a fact that Mr.Dixon had never asked
7 you to show up with that report by a given time? That
8 you simply promised him that you would report to him as
9 soon as you had all the facts?
10 A He told me he wanted that report that night.
11 Q Let me call your attention to your deposition
12 transcript, page 238, line 17:
13 "Q Had you promised Mr. Dixon that you would
14 have a written report the following morning?
15 "A I told him I would have -- that I would go
16 to see Mr. Harris and have his report, and have everything
17 for him the following day.
18 "Q So you had promised Mr. Dixon a written report
19 the following morning?
20 "A I didn't promise. I told him I would try
21 to give it to him by the following morning."
22 Q Now, do you remember me asking you
23 those questions and you giving me those answers?
24 A Yes, but I was always telling you I was
25

Q This is an incident involving yardmaster Chauncey, isn't it?

A At that time I thought it was Chauncey, but it was somebody else.

Q Your testimony is that it was somebody else?

A At that time, see, we were grabbing for straws up there. You were asking me something that happened two and some odd years ago. At that time I wasn't sure. We got another yardmaster there by the name of Bukowski, that was just breaking in at that time, and he was involved in a couple of mishaps, too, at that time.

Q So it is your best recollection now --

A I told you at that time I thought it may have been Mr. Chauncey, but since then I found out it was a fellow by the name of Mr. Bukowski, who at that time was a young yardmaster who had just come from the Richmond Hill Yards, and freight yards, and he was not too aware of the station what was going on that night.

Q Wasn't this gentleman you have just mentioned posing for Mr. Chauncey at that time?

A I don't know, I couldn't tell you, to be honest, without checking the record, to be honest with you.

Q Let's move on to another entry, Mr. Gaynor. This is on 12/16/74.

they would put him back and the way the union agreement reads that the move-up in men as the guys retire, this man was automatically -- he had to be put back into New York. I did not want him, but the way the agreement rules read, at that time I was forced to take him back in New York, Mr. Chauncey.

BY MR. SOLLIS:

Q Mr.Gaynor, I would like you to show me an entry in the log book made on August 21, 1975.

A Yes.

Q I don't think there is much doubt about that this is an incident involving Mr. Chauncey?

A Yes, it is, that's correct.

Q It led to the delay of a train for some 17 minutes, isn't that correct?

A That's correct.

Q As I recall you told me you made no written investigationof this incident, but rather you just made it a matter of record, isn't that correct?

A Yes, we did. We got a hold of him, he was chewed out for it, and that was the way it went.

Q Mr.Gaynor, I'd like to show you some further exhibits from the log book, further entries. Here is one

Q Let me call your attention to an entry on 10/31/75, Mr.Gaynor.

You will see in the log book that Mr.Brown states that Train Number PJ1230 was 21 minutes late on account of yardmaster Chauncey thought that Line 3 was going out of service at 12:10,and the report goes on, "Mr.Chauncey tried to pull the equipment off No. 17 to the yard and apparently lost power and when the statioh-master informed him why didn't he use Track 18 or 19, apparently Mr. Chauncey told the stationmaster that Line 3 was out of service and the stationmaster sayd, no, that isn't so, after he checked with A-tower,"and then the report continues, and Mr.Chauncey finally checked A-tower and apparently followed up on the stationmaster's suggestion and used 18 track for PJ1230 and as the result of this the train left 21 minutes late.

Do you see that entry?

A Yes, right, I also see there where the station-master did get in contact with A-tower for the information.

Q And you haven't come up with any written investigation or a report concerning this incident, have you, Mr.Gaynor?

A No, that was just what you call the making a move with extra set of equipment. PJ 1230 does not mean

1 if he leaves an hour and a half late. It is an extra
2 set of equipment. We don't worry about that extra equip-
3 ment. If it is a regular PM1230, a shop car going to
4 Jamaica, as long as he gets there before the rush hour in
5 the morning.
6 THE COURT: It is not a passenger train?
7 THE WITNESS: Just an extra piece of equipment,
8 shop car. It could leave two hours late, we do it,
9 your Honor. I wouldn't even worry about it. No criticism
10 whatsoever.
11 THE COURT: I noticed that in Exhibit 3 --
12 THE WITNESS: There is a PJ1230 we use that
13 your Honor for, like --
14 THE COURT: There are a lot of them in here.
15 THE WITNESS: They are extra equipment trains,
16 your Honor. What we do like if we get, we will turn off
17 equipment in Jamaica when we wind up any time of the night
18 or day, you know, with shop cars, so we take them up
19 on the extras, so we don't have to hook them up on extra
20 equipment.
21 We run it every night.
22 THE COURT: It was canceled that night?
23 THE WITNESS: We use it just because we have
24 shop cars in there. It is really nothing to get excited
25

about. It is just an extra equipment train.

BY.MR. SOLLIS:

Q Mr.Gaynor, I would like to show you an entry on December 8, 1975, in the log book, right down here on the right-hand corner, and I know that you recall this entry quite well, don't you, Mr.Gaynor?

A This is the one with Mr. Chauncey on this one, right.

Q That's right.

A And I think this was the one that that letter was for, getting rid of Mr. Chauncey out of New York.

Q Right. And apparently Mr. Chauncey misrouted train 857 to 2B on top of 762, and as the result Mr. Chauncey, I think, if you will count them up --

A I know, I remember that night, sir, I don't have to count them.

Q 38 trains, isn't that right?

A I think this was one of the nights that led to Mr. Chauncey's downfall that I disqualified him.

Q As the result again of Mr. Chauncey being disqualified in New York, is that he had to work as a yardmaster in a freight yard?

A I believe. I don't know where they put him after he left New York. All I know is I gave him to

Mr. Dixon, where he wanted to put him after that, I don't know, but I wouldn't leave him work in New York.

Q. There is no difference in any pay in working as a yardmaster in the freight yard and working as a yardmaster in Penn Station?

A No.

Q In fact today Mr. Chauncey is back in his position as a yardmaster working in Penn Station, working for the Long Island Railroad?

A Yes, sir, but that is only with union agreement. That is the only reason he is back. I was forced to take him back.

THE COURT: The yardmasters are under union contract?

THE WITNESS: Yes, they are.

THE COURT: Stationmasters are not. That is a management employee.

THE WITNESS: That's right.

THE COURT: Under the union agreement they have to have a hearing and so forth?

THE WITNESS: That's right, and also, we go through the whole bit, you know, your Honor, the board and everything else.

MR. SOLLIS: I have no further questions,

your Honor.

THE COURT: Any redirect?

MR. RUBIN: Yes, your Honor.

REDIRECT EXAMINATION

BY MR. RUBIN:

Q Mr.Gaynor, in response to Mr.Sollis' questions you stated that you had very little personal contact with Mr. Harris, is that correct?

A That's correct.

Q You do get oral valuations from your subordinates?

A Yes, I do.

Q Concerning Mr. Harris' performance?

A Yes, I do.

Q You do read the logs every day?

A Yes, I do.

Q And they give writeups of the actions taken by ASM and delays and everything else?

A That's correct.

Q Now,Mr. Harris isn't the only assistant stationmaster who works the 11:00 to 7:00 shift, is that correct?

A No way.

Q And you put new men in there, people who are

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just qualified?

A Yes, I do.

Q And they operate the station all by themselves don't they?

A That's correct.

Q And the fact that there is no assistant trainmaster there does not falter their capacity to handle the station, does it?

A No way.

Q Now, when you spoke to Mr. Morra and Mr. DiCataldo and said that you would appreciate it if they would have A-tower contact the assistant stationmaster, what did they answer you?

A They told me that if the man was not busy that he would definitely have him called, but he would still like to have the stationmaster continue to call them up there on account of they have quite a bit of functions going on at A-tower and there are many times that they can't get right to the stationmaster.

Q In fact that is not the normal practice for A to call the stationmaster?

A No, he does business strictly with the yardmaster there.

Q The stationmaster could hear it over the

loudspeaker?

A That's the idea that youhave that speaker system.

Q He gets it right from the yardmaster also?

A Right from the yardmaster, also.

Q Now, this log writeup that Mr. Sollis showed you, there was no mention of Train 1691 and 195 being delayed, is there?

A No, there was not.

Q You wanted explanations for those trains, too, didn't you?

A Correct. More so when I started to see the station sheets there where I seen wrong times entered on them and I saw writeovers on times of arrival that started me to really want to ask questions.

Q That leads you to a conclusion?

A That led me to the conclusion that somebody was trying to cover something up, I am geing honest with you.

Q The fact is that Mr. Harris in the past noted delays to incoming trains as well as outgoing trains, hadn't he?

A That's right.

Q Mr.Sollis, in cross-examining you, stated to

you that Mr. Civitillo had testified under oath that he spoke to you on the 11th. Now, let me read to you from the trial transcript. You had a previous --

"Q You had a previous conversation with Mr. Gaynor?

"A On the telephone.

"Q Could that have been on the 10th instead of the 11th?

"A When was Wednesday?

"Q It was the 10th?

"A Then I am sorry, it was the 10th, since working nights I have my dates and times put together."

Does that refresh your recollection?

A I can't remember. I know I talked to him on the following afternoon. I am saying it was the 10th.

MR.SOLLIS: Can you tell me where you are reading from?

MR.RUBIN: Page 414.

Q Now Mr. Sollis had also said to you that, well, did Mr. Harris say that he would have the report on the 12th, the morning of the 12th, and you answered, no, I don't believe he did.

A That is correct.

Q And he said, you had not received the report

from Mr. Harris when you ordered him to have it on the night of the 10th, did you?

"A No, I did not.

"Q And Mr. Harris had promised to give you a report when he came in that night and you did not receive it?

"A That's correct, from Mr.Rizzacasa. correct."

Q Did you have any reason to believe that he would have it for you on the morning of the 12th?

A Not really, not the way things were going.

Q And isn't it a fact that on at least four or five other occasions Mr. Harris has failed to give you write-ups?

A That has happened at least four, five times. I requested writeups from him on different delys. I never got them.

Q That is just in the last year?

A That is since I'll say the beginning of the year, since December of like last year.

Q Since the last --

A Over the period of a year.

Q Previous to that he had given you trouble?

A That's right, I hadn't had no writeups or anything else, also.

Q On the night of the 11th, when you took Mr. Harris out of service, you did have reports from 40 office that there are at least 45 minutes prior to 12:41 that Line 3, there was a hold on line 3?

A And also that there had been several communications through the speaker systems through that stationmaster's office, and I can't understand why nobody could ever hear them withthem speakers sitting right in front of the desk and right here you get speakers all about you, and even if you were standing in the corner by the door, you still hear these speakers.

Q And Mr. Civitillo did tell you that he had heard Lehr tell Harris to make sure the trains pulled west?

A That's correct.

Q Mr. Civitillo did tell you that he himself announced over the speaker that there was a hold on 19 track to go into Line 3 after 400 clears?

A That's correct.

Q He did tell you that when the train was reported by Harold at 12:18 that he had Lehr tell Harris to pull that train west, is that correct?

A That's correct.

Q You did have the report from Mr. Sherer that stated over the loud speaker system in the stationmaster's

office there was an announcement that Line 3 was going to be taken out --

A Yes, there did, some time around 12:05 that he heard Line 3 would be taken out after train so and so left, but he didn't have no definite train on it.

Q Now, Mr.Sollis asked you before, or implied before that you had not answered his question honestly on page 263 of the deposition when he claims to have stated to you:

"Q When was the first time you spoke to Mr. Dixon?"

Reading that I see the question"And this is the first communication you had with Mr. Dixon? "

THE COURT: Page number.

Q On page 263.

"A On the writeup, yes.

"Q Was the first conversation you had with Mr. Dixon on that writeup on the morning of the 12th?

"A It was after midnight, right.

"Q On the morning of the 12th?

"A Yes.

"Q On the night of the 12th you spoke to Mr. Dixon, correct?

"A Yes.

Q And then you wrote your writeup?

"A That's correct.

"Q The first conversation you had with Mr. Dixon about the writeup was the next morning?

"A That was in the morning when I broke it up with him.

Q So Mr. Sollis never asked you whether you spoke to Mr. Dixon that night, did he?

A No, didn't even ask me that.

Q Mr.Civitillo told you that Mr. Lehr had requested him to notify him about fouling when you spoke to him on the 10th, and isn't it a fact that Mr. Civitillo testified that he never remembers hearing the conversation at all before this Court?

A That is correct.

Q The yardmaster is a represented employee, is that correct?

A That is correct.

Q Pursuant to union contract he would be entitled to a hearing before he was --

A Yardmaster, definitely.

Q Did you know Mr. Landsberg?

A Yes, I did.

Q Who was Mr. Landsberg?

A He was assistant trainmaster that was assigned to

to work with me in New York.

Q Was he performing his job satisfactorily?

A No.

Q What action did you take there?

A I had him, I told Mr. Dixon about him, he had him relieved, he sent him back to Jamaica, who in turn where he ended up with being insubordinate with Mr.Steele and he was put back in the ranks of a yardmaster.

Q Was he given a trial or hearing?

A No way, no.

Q You mean he talked back to Mr. Steele?

A He talked back to Mr.Steeele is correct.

Q And Mr.Steele didn't take him out of service?

A Mr.Steele didn't take him out of service. Told him to exercise his rights as a yardmaster, and back he went.

Q Mr. Landsberg was a management employee?

A Yes.

MR. RUBIN: No further questions.

MR. SOLLIS: Very brief, your Honor.

THE COURT: Yes, certainly.

RECROSS-EXAMINATION

BY MR. SOLLIS:

Q During the course of your testimony, Mr.

Gaynor, Mr. Civitillo and Mr. Segreto testified that Line 3 usually goes out after Train 400. Now that just isn't so, is it?

A It is, I wouldn't say it goes out all the time, but we -- if you hang your hat on it, around that time it does go out.

MR. SOLLIS: I have no further questions.

THE COURT: Anything further? You may step down.

MR. STOKES: We have another witness ready, your Honor, but may we have a break.

THE COURT: How long is your witness going to be?

MR. STOKES: Shouldn't take long.

THE COURT: Long means what?

MR. RUBIN: I don't have more than five minutes with him, your Honor. I can't speak for --

MR. STOKES: He is a short witness basically as far as we are concerned.

THE COURT: Is that the end of the case?

MR. STOKES: Oh, no, no.

THE COURT: What else do we have?

MR. STOKES: We have tomorrow with, assuming that tomorrow is available for us, we would have Mr. Dixon

and Mr. Zeman.

THE COURT: It is available for you.

All right, we will take a ten minute recess.

(Recess.)

(continued on next page.)

End 3 4 PM

(In open court; all parties present)

MR. STOKES: Call Mr. Rizzacasa. Mr. Rubin will conduct our examination.

L O U I S J O H N R I Z Z A C A S A,

called as a witness by the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RUBIN:

Q By whom are you employed, Mr. Rizzacasa?

A Long Island Rail Road.

Q In what capacity?

A I'm the terminal trainmaster at Penn Station, New York.

Q Were you on duty on the morning of November 10?

A No, I was not.

Q Mr. Harris has testified before this Court that he spoke to you on the morning of the 10th about delays to train 32 and your reaction was that you just shrugged.

Did that ever happen?

A No, it did not. I wasn't on duty; I was home.

Q You were working on the morning of the 11th, were you not?

A Yes, I was.

Q And what time did you arrive in the station-master's office?

A Approximately 6:45.

Q Did you relieve Mr. Harris?

A Yes, I did.

Q When you relieved him, what did he do?

A He took the log and went back on the desk and started writing out the log.

Q Was the office busy at this time?

A No, it wasn't. Mr. Sherer was there and Mr. O'Brien.

Q Do you remember whether Mr. Harris was continually interrupted by questions from passengers or crew members?

A No, he was not.

Q Did there come a time when Mr. Harris left the office?

A Yes. Soon after Assistant Stationmaster Constantino got in, about 6:55 or so, Mr. Harris I seen going down 18 staircase toward the train 810.

Q What time did that train depart?

A 7:02 a.m.

Q He grabbed his hat and coat?

A Yes, he did.

Q Did there come a time when you received a telephone call from Mr. Harris?

A Yes, that was approximately 8:20, 8:25 that morning.

Q What did he say to you?

A He said he was supposed to leave a report for Mr. Gaynor, and that he didn't make it out, forgot to, and I told him bring it in that night.

Q Mr. Harris has testified that he hung around Penn Station for approximately an hour and tried to write the report and took the, I believe, 8:11 train back home and called you from home.

Could he have called you from home at 8:25?

A Impossible.

Q Mr. Rizzacasa, were you on duty in Penn Station around 1967?

A Yes, I was a yardmaster at the time.

Q Was there an assistant stationmaster by the name of Al Johnson working with you?

A Yes, there was.

Q What is Mr. Johnson's race?

A Black.

Q He was working as an extra ASM before Mr.

Harris started working as an extra ASM?

A Yes, he was.

Q Did the railroad present any obstacles to prevent Mr. Johnson from becoming an ASM?

MR. HOLWELL: Objection to form.

THE COURT: Sustained.

Q Did you work with Mr. Johnson?

A Yes, I did.

Q Did you try to help Mr. Johnson in the performance of his duties?

MR. HOLWELL: Objection, your Honor.

THE COURT: Rephrase it, please.

Q Would you describe your working relationship with Mr. Johnson?

A I asked Mr. Johnson any time he needed help he was able to call me at home or in my office at any time. If there was any kind of problem, I would try to alleviate this for him and explain to him what should be done.

Q Did he in fact call you at times?

A Yes, he did, several times.

Q Did you work closely with him?

A Yes, I did.

Q Now, Mr. Harris has testified before this Court, Mr. Holwell has misstated to this Court --

MR. HOLWELL: Objection, your Honor. The record will speak for itself. We don't need representation from Mr. Rubin as to what the witness said.

THE COURT: He just said he testified before this Court.

MR. HOLWELL: He said that I misquoted something.

MR. RUBIN: Excuse me. Mr. Holwell stated to this Court that Mr. Harris was the first black in management.

THE WITNESS: In Penn Station, Mr. Johnson, as far as I know, was the first black.

THE COURT: The records ought to show that. But that's your recollection?

THE WITNESS: That's my recollection.

Q You recollect that Mr. Johnson was working before Mr. Harris?

A Yes, I do.

Q You don't know whether he was the first black, do you?

A No, I do not, no.

Q Did you know Mr. W. C. Fuller?

A Yes, I did.

Q Who is Mr. Fuller?

A Mr. Fuller was also an extra ASM. I treated him the same way I did with Mr. Johnson.

Q Did you treat Mr. Harris the same way you treated Mr. Johnson?

A Yes, I did. As a matter of fact, my supervisor when he gave him the examination was Roger Milroy at the time, tried to rephrase questions in such a way as to try to pull the answers out of Mr. Harris, and I discussed this with Mr. Milroy after the examination, and he said he couldn't even do that, and that's why he failed the test.

Q Well, did you work with Mr. Harris after he became an extra ASM?

A Yes, I have.

Q You worked with Mr. Fuller?

A Yes, I have.

Q Did Mr. Fuller start at about the same time as Mr. Harris?

A Approximately around the same time.

Q Do you know Mr. Scott?

A Yes, I do.

Q Who is Mr. Scott?

A Mr. Soctt is our assistant stationmaster now. He has the relief job.

Q What is his race?

A He is black.

Q And Mr. Fuller?

A Black also.

Q Do you know Mr. Brown?

A Yes, I do.

Q Who is Mr. Brown?

A Mr. Brown is an extra ASM, or was an extra ASM at the time when I was in New York, and he is also black.

Q Do you know Mr. Mayes?

A Mr. Mayes, yes, I do.

Q What is he?

A He's an extra ASM also.

Q What is his race?

A And he is black.

MR. RUBIN: No further questions.

THE COURT: Do you recall how many ASM's are black, as far as you know?

THE WITNESS: Not offhand, your Honor.

THE COURT: Approximately.

THE WITNESS: Approximately, I'd say, five or six.

THE COURT: How many are white?

THE WITNESS: Right now we have about, in New York, three, I'd say.

THE COURT: The others all work in New York? Penn Station?

THE WITNESS: Yes, most of the time they work extra in and out of New York and Jamaica.

THE COURT: Their extras that means they fill in?

THE WITNESS: When there is a vacancy.

THE COURT: All right.

CROSS EXAMINATION

BY HOLWELL:

Q Mr. Rizzacasa, you spoke about a Mr. Johnson who worked as an ASM he was never permanently assigned as assistant stationmaster was he, he worked as an extra?

A He was an extra ASM but worked quite frequently because we had a vacancy at the time.

Q An extra ASM is somebody who is used when there is a vacancy in the ASM position, fills in, is that right?

A That's right.

Q You say there is a number of blacks who work in assistant stationmasters' positions. Has the railroad recently instituted a procedure whereby vacancies for assistant stationmasters' positions are posted and people actually apply for those jobs?

A No.

Q They don't have that kind of a procedure?

A No, they are appointed. They are appointed people.

Q There is no posting procedure whereby the management advises personnel of the availability or opening of assistant stationmasters' jobs and applications are made for that position?

A Not applications. What they do is request letters.

Q Excuse me?

A They request letters for this. If you are interested in certain positions on the railroad and that only goes for yardmasters, or any appointed position, a letter is written to the supervisor and then transferred over to a higher echelon and he decides on who he wants to pick.

Q I would just like to restrict my questions and your answers to management positions such as assistant stationmaster.

A A yardmaster is a management position, also. Middle management.

Q I thought yardmasters were union employees.

A They are represented employees but they are considered middle management.

Q Do you know if yardmasters are given trials or

hearings before they are removed from service?

A Oh, yes, that can be done.

It can be done.

Q And they are management employees?

A What.

Q And they are management employees?

A I said middle management. Represented middle management. Those jobs are not up for bid. They are appointed positions middle management represented.

Q Now, let's go back to the assistant stationmasters' job. Maybe I misled you. I am not trying to imply that they are put up for bid as a union job is. What I am saying is that isn't it true with the assistant stationmaster's job vacancies are announced and employees are requested to make a letter application for that vacancy?

A Yes, they are.

In other words --

Q That is the procedure for filling an assistant stationmaster's job?

A Not to fill it. You know you are not --

Q The procedure for getting applications?

A The procedure for getting applications of men who are interested in progressing up the line, and getting a job, their next step from an usher to assistant station-

1 master and they want letters.

2 Q Isn't it a fact that the assistant stationmaster

3 which is populated by a few blacks these days is the only

4 management job on the Long Island Railroad where

5 vacancies are announced to employees and where interested

6 employees are asked to send letter applications in;

7 isn't that correct?

8 A Now a yardmaster position --

9 Q Aside from the yardmaster, we will put him in a

10 special category.

11 A What are you talking about now? You are talking

12 about assistant trainmasters.

13 Q Assistant stationmaster. Isn't that the only

14 position in management on the railroad where vacancies

15 are made known to the employees, and the employees are

16 requested if they are interested, to submit letter

17 applications?

18 A They are requested, yes.

19 Q That is the only management job?

20 A That is the only management job that I know of

21 but that doesn't stop them to say that they didn't write

22 a letter for other positions.

23 Q No question about that?

24 A In other words, if you want to get ahead you write

25

in letting the supervisor know that you are interested in something.

Q Now, Mr. Fuller was also an extra, right?

A Yes, he was.

Q In other words, he was an usher who filled in as an assistant stationmaster when needed, is that right?

A Right, he was an extra ASM.

Q Mr. Harris was the first permanent black member of management as an assistant stationmaster, wasn't he?

A I couldn't answer that because black, white or yellow, it is the same to me. I don't go by color or race.

Q Well, you know Mr. Harris is black, don't you?

A I know Mr. Harris is black, I work with him.

Q Do you know of any other black permanent assistant stationmaster who are in the railroad?

A I don't know, there might be some in Brooklyn or Jamaica, I don't cover those positions.

Q But you don't know?

A I don't know if he is the first black, fine, I don't know.

Q You say that on the morning of November 11th, Mr. Harris left the office at about 6:55?

A Approximately around that time, 6:55, between 6:55 and say 6:58, 6:59, he grabbed his hat and coat and ran

down to 18 track.

Q Mr. Harris called you on the morning of November the 11th, is that correct?

A On November the 11th he called me, yes, sir, about like I say, 8:20, 8:25.

Q Did you mention Mr. Harris' phone call to Mr. Bloomfield that day?

A I don't recall. I think I only told Mr. Gaynor about that phone call later on that day.

Q You found out when you spoke to Mr. Harris I guess that there were delays to trans the prior evening?

A No, I didn't find anything out from Mr. Harris. All Mr. Harris told me on the phone was that he was supposed to make out a report which he failed to do so and I told him fine, I says bring it in tonight.

Q Didn't he tell you that he was supposed to make out a report with regard to some delays the night before?

A No, he didn't say anything about delays. He said he was supposed to file a report to Mr. Gaynor that morning and he failed to do so, and I says, well, bring it in tonight.

Q And the first time you found out about the delays when you talked to Mr. Gaynor later that morning?

A Later that morning, I did.

Q Let me read you some of your deposition transcript, Mr. Rizzacasa, on page 37:

Line 7:

"Q What did Mr. Harris say to you in that phone call?

"A In the phone call he said, 'I forgot to make out a report to Mr. Gaynor. I was supposed to leave there about delays the night before.'

"And I says, 'If you haven't got it bring it in with you tonight.'"

A I might have said that because I knew there was delays after that but at the time of the phone call I cut him off short, because I was having a problem in the station at the time, and I am telling you what he actually said that morning was, he failed to put a report in that Mr. Gaynor wanted and I told him to bring it in that night and I cut him short.

Q So you are saying now that Mr. Harris didn't tell you that the report was --

A No, he didn't say anything about any delays or nothing on the phone.

Q Your memory today is better than it was a couple of days ago when I took your deposition?

A No, I just might have added that in, just reciting

1 it, that's all.

2 Q Although Mr. Gaynor told you later that morning

3 that there were delays he never discussed it with you,

4 what the delays were all about, did he?

5 A No, I, my job entails more than this, and Mr.

6 Gaynor handles, that I was working manipulations at that time

7 for Thanksgiving Day and --

8 Q I just want an answer, yes or no, please.

9 A No.

10 Q You didn't discuss the substance of those delays

11 with Mr. Gaynor?

12 A No, no.

13 Q To this day you don't know who was responsible

14 for those delays, is that correct?

15 A Well, according to what I have, what do you

16 call, I seen, I understand the assistant stationmaster was

17 in charge at the time is responsible. If there is any

18 delay in the station at that time the assistant station-

19 master is the responsible person.

20 Q You are saying now that you do know who was

21 responsible for the delays?

22 A I said I am assuming if there was delays of that

23 day the man in charge is usually responsible for the

24 delays, which is the assistant stationmaster.

25

Q Other than your assumptions, you don't know who was responsible for the delays, do you?

A No, I don't.

Q And I suppose it is possible that somebody other than the man in charge could be responsible for delays, isn't that true?

A Sure, if a man fell asleep at the tower or something or other like that a yardmaster made a boo boo could be responsible.

Q Like if a yardmaster forgot to tell the assistant stationmaster something it wouldn't be the assistant stationmaster's fault, would it?

A No, it would be the yardmaster's fault.

Q It would be the yardmaster's fault?

A Yes, sir, but you got to go according to the particulars now.

Q Well, I thought you said you didn't know anything about the delays.

A I didn't know anything about the delays.

Q How do you know Mr. Harris is responsible for them?

A No, you are saying you are blaming the yardmaster for something that maybe wasn't his fault. Now, if it is something, different particulars you can hang a

1 yardmaster on.

2 Q I'm not blaming anybody --

3 MR.STOKES: Your Honor --

4 Q Why did you conclude that Mr. Harris is

5 responsible?

6 THE COURT: Equipment failure.

7 Q It could be personal failure of somebody

8 else.

9 A Equipment failure but don't blame it on a man,

10 one individual.

11 Q Did you just blame it on Mr. Harris?

12 A The man in charge, I said.

13 If it was the assistant stationmaster at the time.

14 If I was in charge it would be my responsibility.

15 Q So whenever you are on the job and somebody below

16 you screws up on the job, it is your responsibility?

17 THE COURT: I don't think he has indicated that

18 he knows the details of this to form an opinion as to

19 whether this was Mr. Harris' fault or not.

20 MR. HOLWELL: I think that's right, your Honor.

21 Q In addition, Mr. Rizzacasa, you don't know what

22 Mr. Gaynor's conclusions were as to who was responsible

23 for those days, do you?

24 A No.

25

Q And although you worked with Mr. Gaynor he has never advised you as to what the outcome of his investigation was?

A No.

Q The only thing that Mr. Gaynor ever told you was that he took Mr. Harris out of service for not having the report there that night, is that correct?

A That is correct.

Q There has been some testimony that you haven't been a witness to, Mr. Rizzacasa, to the effect of when line 3 usually closes at the time of night on the 11:00 to 7:00 shift. Isn't it a fact that there isn't any specific time that the line closes, that you couldn't say that the line generally closes for example after train 400 departs?

A In my background experience as a yardmaster I can give you that.

Now, if they request a line tunnel out after 12:00 o'clock, they certainly aren't going to make it 12:50. It is going to be within that frame between 12:00 and 12:30. So normally after 400 line 3 goes out.

Q You are saying that generally the line goes out after 400 departs?

A After 400, right.

Q That is based on your experience?

A That's right.

Q And you are as sure of that as you are sure of all your other testimony today?

A Oh, yes, sir, 28 years of experience ought to qualify me for that.

MR. HOLWELL: One more second, your Honor.

THE COURT: Surely.

(Pause.)

MR. HOLWELL: I have a few other questions of a general nature but I think I can do that with Mr. Dixon tomorrow.

THE COURT: You don't need this gentleman any more. All right. You may step down.

(Witness excused.)

MR. STOKES: 10:00 o'clock, your Honor?

THE COURT: I have a sentencing and a couple of pre-trials at 9:30 so it will probably be close to 10:00 o'clock. Be here at 10:00.

Now, how much longer are we going to go gentlemen, I have got to prepare my schedule too.

MR. STOKES: We have two more witnesses, your Honor, I would figure that we should be finished tomorrow with those witnesses, and --

MR. HOLWELL: Mr. Rubin is indicating three.

MR. STOKES: And, briefly, Mr. McGowan who will be very brief just to verify the transcripts of the tapes.

MR. HOLWELL: We may be able to stipulate to that.

THE COURT: We can stipulate to that. How long do you think, do you think it will take more than the morning?

MR. STOKES: The direct certainly won't. Mr. Dixon would be about a half hour at most.

MR. RUBIN: Your Honor, I believe Mr. Dixon won't be more than 15 minutes, Mr. Zeman no more than 10 minutes.

THE COURT: We will finish tomorrow morning.

MR. HOLWELL: We have not made a final decision, your Honor, as to whether we may want to read the transcripts and see if we want to put anything else in. We have a few exhibits that we advise the Court that we wanted to put back in. I don't know that we would go into the afternoon but I would say it is a close question.

THE COURT: All right. 10:00 o'clock in the morning, gentlemen.

(Adjourned to January 4, 1976 at 10:00 a.m.)

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Frances Joy Capers, et al.,

vs 72 Civ. 3168

Long Island Railroad et al.,

New York, New York
January 4, 1976

(Trial resumed.)

MR. STOKES: We will call Mr. Dixon. Mr. Rubin will conduct our examination, your Honor.

THE COURT: Mr. Dixon, take the stand.

L A W R E N C E W D I X O N, called as a witness by the defendants, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. RUBIN:

Q Mr. Dixon, by whom are you employed?

A By the Long Island Railroad.

Q In what capacity?

A Assistant superintendent of transportation.

Q Mr. Dixon, when did you first become aware of the delays of the trains on the night of November 9th and 10th?

A When I arrived in my office on the morning of the 10th.

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

Q About what time was that?

A Excuse me?

Q About what time was this?

A Approximately 6:00 o'clock.

Q How did you become aware of delays?

A The movement bureau prepares a log for the previous day pertaining to any activity that is on the railroad dealing with train delays, the reasons for it, mechanical breakdowns, any kind of accidents, injuries, lateness of trains, equipment problems, and they prepare a daily log and I review this log each morning.

Q Did you also receive any writeups from the train dispatcher?

A On the morning in question I received a writeup from our chief dispatcher, Mr. Tiegen, pertaining to an incident that had developed in New York where several trains were reported late due to an error on someone's part in New York, that the stationmaster had claimed at the time that he was failed to be notified that the trains, they were going to take line 3 out of service, resulting in the trains being delayed in New York.

Q You were concerned about those delays?

A I was, sir.

Q What did you do as a result of this?

A Well, after reading the log I called New York and I spoke to Mr. O'Brien. He was the supervisor on duty. I asked him about the delays in New York and he related, and he related to me that there was a little bit of a controversy between the stationmaster, the yardmaster and C Tower as to what time line 3 was taken out of service by Amtrak.

I informed Mr. O'Brien that he better prepare a report from all the individuals concerned, a writeup of each individual concerned dealing with their side of the story.

Q Did there come a time that morning when you spoke to Mr. Gaynor?

A Around 8:00 o'clock that morning I called Mr. Gaynor at home and asked him would he stop into Jamaica on his way into New York.

Later on that morning, Mr. Gaynor arrived in Jamaica, after he had gone to New York. He had come back to Jamaica. I spoke to him about the activities at Penn Station. I wanted him to get into it, make sure we had writeups from all individuals concerned so we know what the story was so it could be evaluated.

Q By the way, Mr. Dixon, during this hearing we have heard the term Ding Dong School. Could you explain

what that is?

A It is a meeting held in the su intendent's office each morning approximately at 8:45 either conducted by the superintendent himself or myself.

There we review the log for the previous day, and its activities, various men sit around the room representing various subdepartments of the transportation department and representatives from other departments of the railroad.

Q What is the purpose of this meeting?

A Just to go over the previous day's report and to find out where the responsibilities lay for any lateness of trains. Was it caused by mechanical error, mechanical breakdowns, rather? Maybe a track conks out. Was it the public? Anything dealing where a train might have some type of a breakdown, a train delayed, accident, injuries to passengers on or about stations or trains, freight trains knocking passenger trains out of their regular schedule, anything dealing with the day before's operation.

Q So is it a regular practice on the railroad to increase the efficiency and safety of operations?

A It is, sir.

Q When you called Mr.O'Brien in the morning was

this before that day's session of Ding Dong School?

A Definitely.

Q Why did you call him before Ding Dong School?

A Well, I wanted to find out if there was any additional report as because on the previous day's log there were some evening trains listed as arriving late in New York and I wanted to prepare myself before the superintendent's meeting to be able to substantiate the lateness of these trains.

Q At Ding Dong School is there a representative from Penn Station at the meeting?

A No, I normally, if there is any questions dealing with New York I normally take care of the actions out in New York due to the fact of if we had any late trains the previous day, Mr. Gaynor would either call me and tell me what the late trains were, or sometime during the evening one of his stationmasters or assistants will leave me a written report.

Q So, in other words, you have to answer to the superintendent concerning delays at Penn Station?

A That is right, sir.

Q Is there anyone else you have to answer to?

A I have to answer to the president of the company.

Q He is at these meetings?

A On various occasions, yes, sir, he is.

Q The superintendent reports to the president?

A That's right, sir.

Q You had requested reports from Mr. Gaynor on the day of the 10th, is that correct?

A That is right, sir.

Q On the morning of the 11th had you received the reports that you had requested?

A On the morning of the 11th I received a report from the yardmaster and the C Tower, the operators at C Tower. I called Mr. Gaynor when he arrived in New York somewhere roughly between 9:30 and 10:00 o'clock and asked him where the reports were from the stationmaster.

Q What did Mr. Gaynor say?

A Mr. Gaynor said that Mr. Harris had failed to submit the report. I told him, well, I says, "I will tell you what I want you to do. I want you to meet Mr. Harris tonight, and I want that report."

Q Incidentally, before you said you received reports from the yardmaster and C Tower, was the reports from the yardmaster and the usher that you had received?

A No, there was --

MR. HOLWELL: Objection, your Honor, leading questions.

A There was one from the --

THE COURT: No --

A There was a report from Mr. Lehr and I believe the other report was from the operators of C Tower.

Q So you told Mr. Gaynor to go that evening and get a report from Mr. Harris?

A That is correct, sir.

Q Were you being pressured from Ding Dong School for a report about these --

MR. HOLWELL: Objection to the form of the question.

THE COURT: Yes, sustained.

Q Had you discussed the incident on the morning of the 11th at Ding Dong School, the incidents of the delays on the 9th and 10th, the next morning at Ding Dong School?

A On the morning of the 10th I discussed it in the superintendent's meeting and I told the superintendent I was into it and I should by the following morning have writeups from all concerned, so it could be evaluated.

Q By the following morning you still didn't have writeups, did you?

A I spoke to, as I didn't have the writeups on my desk, all the writeups on the morning of the 11th, I spoke to Mr. Valder when he came in and told him that I have

no answers for the delays outside of the writeup that we had received from Mr. Teigen, and that Mr. Gaynor was to get me the other writeups from the men involved and as yet I have not received them.

Q Did there come a time on the night of the 11th--12th, when you again spoke to Mr. Gaynor?

A Mr. Gaynor called me at my home approximately about midnight that night and he related meeting Mr. Harris when he reported for his assignment in New York, and a discussion he had with him pertaining to the lateness of trains on the morning of the 10th, the 19th and 10th, and also that why he failed to submit a report.

Q Did Mr. Gaynor advise you that he had taken any action with respect to Mr. Harris?

A Mr. Gaynor advised me.

MR. HOLWELL: I object to the form of the question. He can ask him what Mr. Gaynor said.

THE COURT: Ask what the conversation was.

Q Did Mr. Gaynor state anything further to you in the conversation?

A Mr. Gaynor stated to me that he had relieved Mr. Harris and told him to exercise his seniority.

Q Did you then tell Mr. Gaynor anything?

A I said to him, "Fine. Give me a written report,

a detailed report in the morning. I want it on my desk in the morning.

Q On the morning of the 12th, did Mr. Gaynor give you a detailed report?

A Sometime roughly about 10:30 I met Mr. Gaynor and he gave me a report on the instance of the night before.

Q Does Mr. Gaynor have the authority to tell a man to exercise seniority?

A Yes, sir, he does.

Q Is that subject to your approval?

A No, sir, it isn't.

Q Could you overturn his decision?

A I can, sir.

Q Did you, in this case?

A No, sir.

Q What factors did you take into consideration in approving Mr. Gaynor's decision?

A Mr. Harris' performance, other incidents, other acts of insubordination and due to the fact of the constant report of late trains in and out of New York, and other reports I have received on his activities from Mr. Gaynor.

Q Had you received a report around the night of September 16th concerning an incident with Mr. Satter?

A I did, sir.

Q Were you pleased with Mr. Harris' actions on that night?

MR. HOLWELL: Objection to the form of the question, your Honor.

THE COURT: Yes, sustained.

Q Did you form any evaluation as to Mr. Harris' actions on that night?

A When I arrived in my -- when I arrived in the office at Jamaica approximately 6:00 a.m. there was a report there left by Mr. Satter dealing with the conversation he had with Mr. Harris in New York and also the report of late trains arriving there westbound.

Due to the fact that Mr. Harris was not in the stationmaster's office at the time but was in another location, stapling up programs which I later found out he was instructed to do during his time of duty, I spoke to Mr. Satter about it, wanted to know what the hell went on with it, and he related to me that when he called there Mr. Harris wasn't in in the stationmaster's office but he was in PD 4, and when he spoke to him about it he told him that he was assigned to do this job. And the report continued on that Mr. Harris accused Mr. Satter of using racial overtones in his manner of speaking to him and that was the length of our conversation.

Q What action did you then take concerning the claim of racial overtones?

A Well, I talked to Mr. Rizzacasa in New York pertaining to it, and later that morning I spoke to Mr. Allen, he was the supervisor of train movements, and I asked him to pull the tape on this morning and I wanted to listen to the conversation between Mr. Satter and Mr. Harris.

Q Did you listen to that conversation?

A I did, sir.

Q You investigated the claim of racial overtones?

A No, sir, I couldn't find anything other than Mr. Satter raising his voice from time to time, but this is his manner of dealing with any individual.

Q Will you describe the system within the railroad of taping certain telephone extensions?

A Our movement office at Jamaica is a network of four sections that deal with four various sections of the railroad. Our dispatchers talk to the various towers in regards to giving out train orders, issuing K cards, clearance cards, issuing orders to work trains, trains crews, and also our movement desk there which controls the four sections, they handle all incoming calls pertaining to fatalities, accidents, breakdowns of equipment,

1 conversation with individuals on or about the railroad,
2 and off the railroad. All these lines are taped. It
3 is 20 lines on the machine. We have a big machine in Jamaica
4 in the movement bureau that controls these various
5 conversations which can be monitored and can be listened
6 to at another time, just to see how our operation is
7 going, what is taking place. We want to check on a per-
8 formance of an individual that was supposed to have called
9 there, reported off sick or something like that, we can
10 check our tapes and we can also monitor the announcements
11 made at Penn Station.
12 Q You take a tape of the PA announcements within
13 Penn Station?
14 A Yes, sir.
15 Q This taping apparatus is kept on a 24-hour basis?
16 A Yes, sir.
17 Q It is kept in the ordinary course of business?
18 A Yes, sir.
19 Q Every day?
20 A Yes, sir.
21 Q Mr. Dixon, are management employees entitled
22 to a hearing or a trial when told to exercise seniority?
23 A No, sir.
24 Q Do you know a Mr. J. J. Dolmat?
25

A Yes, sir, I do.

Q Did there come a time when Mr. Dolmat demoted from the rank of manager?

A He was, sir.

Q Would you explain the situation concerning Mr. Dolmat?

A Well, Mr. Dolmat was a train dispatcher. He was demoted on the grounds of poor performance. His lackadaisical way of handling his train sheets, failing to report delayed trains, delaying trains unnecessarily, and overall was just poor performance as far as the train dispatcher was concerned.

Q Was he given a company trial or hearing?

A No, sir.

Q Do you know a Mr. J. B. Howell?

A Yes, sir.

Q Was he demoted from management?

A Yes, sir, he was.

Q What were the circumstances surrounding his demotion?

A Same circumstances surrounding Mr. Dolmat.

Q Was he afforded a company trial or hearing?

A No, sir.

Q Do you know a Mr. D. C. Roberts?

A Yes, sir.

Q Was Mr. Roberts demoted from management to represented ranks?

A Same reasons for -- yes, sir, he was.

Q What were the circumstances surrounding that?

A Same reasons surrounding Mr. Dolmat, and Mr. Howell.

Q Was he afforded a company trial or a hearing?

A No, sir, he was not.

Q Do you know Mr. A. Lyons?

A Yes, sir.

Q Was Mr. Lyons told to exercise seniority?

A He was, sir.

Q What were the circumstances surrounding Mr. Lyons?

A Poor performance as stated by the other men, reference to the same thing.

Q He is a train dispatcher, poor performance?

A Train dispatcher, sir.

Q Was he afforded a company trial or hearing?

A No, sir, he was not.

Q Do you know Mr. J. M. Roman?

A I do, sir.

Q Was Mr. Roman told to exercise seniority?

A He was, sir.

Q What were the circumstances surrounding Mr. Roman?

A Mr. Roman was assistant trainmaster. Due to his lackadaisical way, failing to complete assignments, in general not a cooperative employee as far as a manager was concerned, he was told to exercise his seniority.

Q Was he afforded a company trial or hearing?

A No, sir, he was not.

Q Do you know Mr. L. E. Satter?

A Yes, sir, I do.

Q Was Mr. Satter disciplined within management ranks?

A He was, sir. Mr. Satter at the time was an assistant supervisor of train movements. He made a human error that resulted in damage to equipment and to company property to the cost of the company and he was demoted.

Q Do you know Mr. R. E. Drumm -- was he afforded a company trial or a hearing?

A No, sir, he was not.

Q Do you know Mr. R. E. Drumm?

A Yes, sir.

Q Was Mr.Drumm told to exercise his seniority?

A Yes, sir, he was.

Q Will you explain the circumstances surrounding

that?

A Mr. Drumm was assistant trainmaster. It is required from all managers from the rank of assistant trainmaster up to be a qualified man on the railroad. He must qualify on the book rules and the physical characteristics of the railroad. Mr. Drumm took it upon himself that he told us in no uncertain terms that he was not going to qualify. That he didn't have much time left on the railroad, and he didn't want to qualify.

Q What action was taken?

A He was relieved as assistant trainmaster and he was demoted back to a yardmaster.

Q Was he afforded a company trial or a hearing?

A No, I don't think so, he was not.

MR. HOLWELL: Your Honor, we will be happy to stipulate that none of these individuals were given any kind of trial whatsoever and that the company's standards are purely subjective in deciding whether or not to removed somebody from managerial services.

MR. RUBIN: Your Honor I have --

THE COURT: Isn't that one of the issues in the case? I have tried to get it narrowed down. What is the issue? What is the issue involved herewith? I thought at the end of the hearing before we adjourned I had suggested that

we focus on what the issue involved is, and I have heard nothing from anybody since then, and so I am under the impression that what is done with management employees with respect to any criteria with respect to --

MR. HOLWELL: Your Honor, our contention --

THE COURT: Your contention I will let you state it, but I think your contention is that he was fired because he was black or because he brought this lawsuit.

MR. HOLWELL: Both reasons, your Honor, and our contention is not that he was fired and not given a trial whereas others have been given trials. To the contrary our contention is that --

THE COURT: You are conceding that there is no practice on the railroad to give a hearing or a trial. with respect to management employees at all.

MR. HOLWELL: With regard to the individuals that Mr. Rubin is talking about --

THE COURT: Or with any management employee now. He is a management employee --

MR. HOLWELL: I wouldn't go that far, your Honor, I think we know of one or two that have been given --

MR. STOKES: Then I think we are entitled to complete our list.

THE COURT: Then bring it out.

MR. HOLWELL: We are only attempting to save some time, your Honor, because we have the list here and we don't make any claim that these people were fired for any other reason than the subjective valuation of their superiors. It is our claim that when you have an organization that has discriminated in the past that the very existence of these subjective procedures would afford no check whatsoever on abuse and are discriminatory in themselves. That is a separate argument.

We are arguing in addition that in this very instance those objective factors regardless of the proclivity for that type of an institution to lead to discrimination, in fact did lead to discrimination because Mr. Harris was removed from service in retaliation for his prior actions against the railroad, and in retaliation--

THE COURT: You are conceding that there is no right for a management employee, which Mr. Harris was at the time --

MR. HOLWELL: We are not conceding there is no right, your Honor. We claim that under the 14th Amendment there should be such a right and the railroad is in violation of that by not having the right. We are conceding that with regard to the individuals on this list that they are not going through, none of them were

given a trial and all of them were fired --

THE COURT: Are you conceding that all of those are entitled to a hearing or a trial?

THE COURT: No. Just the opposite.

THE COURT: I don't get your position. You are conceding the 14th Amendment gives the right to every employee to have a hearing and a trial then?

MR. HOLWELL: That is a separate contention that we have made before your Honor in briefs and we are making again in this case.

MR. STOKES: As long as they are making that contention, your Honor, I think we are entitled to complete our aspect of the case to protect our argument under the Rote and Simbalin cases. This is exactly what this is designed to show, is that no management employee in the history of the railroad has ever had the expectation of a right of trial when he is told to exercise his seniority.

THE COURT: That is what I assume was involved in here.

MR. STOKES: Exactly.

MR. HOLWELL: That is involved, your Honor, only in the 14th Amendment claim which does not rely or depend upon a claim of racial discrimination. It is a separate issue.

MR. RUBIN: Your Honor, if the man --

MR. HOLWELL: And certainly isn't the only issue in the case, your Honor.

MR. RUBIN: Your Honor, if the man has two rights to the hearing one based on the 14th Amendment due process right which they are now conceding that he is not entitled to and a separate one in which either the 1st Amendment or Title 7 right against discrimination, well, he is getting that hearing before this Court and we would concede that he is entitled to that hearing and he has gotten it, but he is not entitled to a due process 14th Amendment.

MR. HOLWELL: Conceptually, your Honor, there are three claims. One does not depend upon a charge of racial discrimination. That is based under the 14th Amendment.

We say that any management employee including Mr. Harris, because he works for a state agency, cannot be removed without a showing of cause. That is a separate claim and I think you can isolate that one conceptually --

MR. STOKES: That is exactly the one that we are dealing with at this point, your Honor.

MR. HOLWELL: Could I finish? Our other argument is that as a point in fact Mr. Harris has been the subject of intentional retaliation and discrimination

as a result of his suing the railroad.

THE COURT: That I understand, all right.

MR. HOLWELL: The third and separate argument is that the very subjective institution of discipline on the railroad, the lack of objective standards in light of the past discrimination by the railroad in and of itself is a violation.

THE COURT: Of course that is a problem that we have a great deal of idfficulty with because we are not trying the whole lawsuit now. We are just trying Mr. Harris' individual claim here. If we get to the position one way or the other either that they were or were not, then we could, and we could only arrive at that after we have a full hearing.

MR. HOLWELL: This is a preliminary injunction hearing, your Honor, and on the basis of the evidence we believe that we will show a likelihood of success on that issue or at least a serious question on the issue, on the basis of the entire record before the Court.

It is very difficult at this point, your Honor, to in effect recite to you all the evidence that is in the record. That is what we intend to do.

THE COURT: I am familiar with all the evidence in the record. I have sat here and I have heard it.

MR. HOLWELL: Those are essentially the three separate claims that we are making.

MR. STOKES: The point is, of course, your Honor, that the first claim that Mr. Holwell mentioned, the so-called right of management to have a 14th Amendment trial, regardless of race or color, this is what this evidence is designed to show, that under the Supreme Court decisions in both the Rote and the Simbalin cases, there is absolutely no expectation or there can be no reasonable basis for an expectation of any management employee to a hearing or trial on the property when he is told to exercise his seniority.

There being no such reasonable expectation and no practice of ever giving it, therefore whether we are a state agency or not we completely are within the doctrine of the Rote and Simbalin cases and there is no 14th Amendment right to a hearing or a trial merely because one is a member of management or merely because the railroad is owned by the State of New York.

We are completely prepared to brief it, but this is what the evidence is laying the foundation for, to show that that claim is complete nonsense.

MR. HOLWELL: Mr.Sollis is more prepared to address the 14th Amendment claim as he has briefed it.

MR. SOLLIS: I just want to make one clarification. It is not our claim that just because you are a management employee that you are entitled to a hearing. Our claim arises when we say a management employee has a claim of entitlement to his job, something akin to a property right, and we claim that Mr. Harris who has put in over 20 years of experience in the Long Island Railroad has something akin to tenure, the Supreme Court speaks of a claim of entitlement. They talk in terms of tenure like a property right and our claim is that we have put in over 20 years, you have this claim of entitlement to your job.

It is something akin to property and it can't be deprived, you cannot be deprived of it by the state without at least a hearing.

MR. STOKES: This is precisely what this evidence is designed to show, that no matter how many years the man has on the job or in a managerial position he has no reasonable expectation to expect tenure because the history and practices in the industry has been you are solely there at sufferance, you have no vested right to the job and we have always proceeded in that basis; therefor, we come within the exceptions clearly delineated in Rote and Simbalin.

MR. HOLWELL: Your Honor, you know our position and you know the railroad's position. The only statement

that I was attempting to make was simply that we will stipulate that the people that they have on this list were not given a hearing.

THE COURT: That is all that you are trying to do.

MR. STOKES: That is fine. If --

THE COURT: Do you have the exhibit? Mark the document as an exhibit and it is conceded, is that correct?

MR. HOLWELL: That is a broad sentence when you say that is conceded.

THE COURT: What is conceded is that all of these were management employees and they were all terminated or told to exercise their rights and none of them were given a formal hearing or trial.

MR. HOLWELL: On formal hearing or a trial, that is right, your Honor. We object to this as being marked in evidence as being prepared for litigation.

THE COURT: Then he is going to testify to it. And that is what he is going to do, all right.

BY MR. RUBIN:

Q By the way, Mr. Dixon, of all the men that we have mentioned so far are they all white?

A Yes, sir, they are.

Q Do you know a Mr. F. D. Smith?

A Yes, I do.

Q Was he told to exercise his seniority?

A Yes, sir, he was.

Q Can you explain the circumstances surrounding that?

A Mr. Smith was an assistant trainmaster. In 1972 the railroad was on strike. We had a walkout by all represented ranks, and we had a lot of perishables in our freight here on the Island, meats, vegetables, frozen foods, that had to be switched and placed into various sidings before they rotted on the sidings. We instructed our supervisors to go out, our road foremen of engines, assistant road foremen and our trainmasters and switch these cars where the various consignees could drive their trucks up and unload their cars.

Mr. Smith was given one of these assignments. He -- in an act of insubordination due to the fact that he refused to switch these cars out due to the fact that they were going across the picket line and Mr. Smith was relieved of his position of assistant trainmaster and told to exercise his seniority.

Q Was he given a company trial or hearing?

A No, sir, he was not.

Q Was he white?

A He was white.

THE COURT: Give me the length of service or years of service of each individual. That has been raised with respect to Mr. Harris' 20 years of service.

MR. HOLWELL: Your Honor, we are going to submit into evidence personnel files of these people. It is in there. We are not going to ask the Court to read them, your Honor, but we are going to extract from them.

MR. RUBIN: I can read date of service, and date demoted, your Honor, if that would aid you in the record.

THE COURT: That is relevant in view of what Mr. Holwell indicated Mr. Harris has 20 years of service. This is all I was thinking about. You are going to give me a lot of personnel files.

MR. HOLWELL: I'm afraid we are, your Honor. As I say we are going to extract them.

BY MR. RUBIN:

Q Mr. Dixon, do you know when Mr. Dolmat was first employed by the railroad?

A Well, without referring to that list --

THE COURT: Would that refresh your recollection? You can't concede that data set forth on this is accurate?

MR. HOLWELL: No, your Honor.

THE COURT: Have you got anybody to testify to that, Mr. Rubin? Have you got anybody to testify that this is extracted from the company records under the rules of evidence? Have you got somebody that will come and say this is a summary of those things, then I will take it.

Q Did you extract this list from the company records?

A I extracted some of it from the company's records, days of service, date promoted, position, and the reasons for more or less regarding to the fact that the men were returned to their represented ranks from the various jobs.

THE COURT: Is this a variation of the records that are kept in the regular course of business?

THE WITNESS: Yes, sir.

MR. HOLWELL: Could I have a voir dire on that?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. HOLWELL:

Q You have a copy of that before you, Mr. Dixon, is that correct?

A Right.

Q You prepared this last year in preparation for your testimony at trial at the last hearing, is that

1 correct?

2 A That is correct.

3 Q You were personally involved in only about the

4 firing of five or six of these people, is that correct?

5 A Yes, sir.

6 Q With regard to the firing of some of the people

7 on this list you ascertained the reason for their firing,

8 and placed that on the document on the basis of verbal

9 conversations with other employees, is that correct?

10 A That's right, sir. Other managers.

11 Q In fact, even with regard to those employees

12 that you were personally involved with in their firing the

13 reason for their firing such as unsatisfactory performance

14 or insubordination is not necessarily spelled out in their

15 correspondence file, is there?

16 What you will have is the RD 17 which just says

17 change job from X to Y, right?

18 A And demoted.

19 Q In all cases you are saying they say that they

20 were demoted for unsatisfactory performance or

21 insubordination?

22 A Some of them do, some just say demoted.

23 Q And some of them don't?

24 A That's right.

25

Q And the ones that don't, the reason that you gave on this form was based either on your own personal involvement or our speaking to other people on the railroad?

A That is correct, sir.

MR. HOLWELL: Your Honor, the document is based on a lot of hearsay testimony --

THE COURT: That doesn't make any difference whether it is based on hearsay.

MR. HOLWELL: It was prepared for litigation last year.

THE COURT: That doesn't make any difference.

MR. HOLWELL: It is not a business record.

THE COURT: Rule 1006.

MR. HOLWELL: Your Honor, we could free at this point to everything other than the last column which is the reason for disqualification.

MR. RUBIN: I offer it for everything except the last column, the reason for.

MR. HOLWELL: Subject to, your Honor, the opportunity to make any corrections on the date of service or the date demoted that is apparent from the personnel file.

THE COURT: Certainly you have the opportunity to present anything to the contrary to this but I have the right to receive it now. All right, no objection

except for the last column. All right, received in evidence.

(Defendants' Exhibit L received in evidence.)

xx

MR. RUBIN: Your Honor, do you want him to read the date of service at this point?

THE COURT: No, the document is in evidence. There is no sense in going through it. May I see it?

Q Mr. Dixon, do you know a Mr. J. A. Cossman?

A I do, sir.

Q Was he told to exercise his seniority?

A He was, sir.

Q What were the circumstances surrounding that?

A Same. He was the assistant road foreman of engines and relates to the same thing as Mr. Smith. The giving of an order and refusal to obey an order, an act of insubordination during the strike.

Q Did you ascertain this information from your files or from your subordinates?

A I did, sir.

Q Mr. R. G. L'Hommedieu, do you know him?

A Yes, sir.

Q Was he told to exercise his seniority?

A Yes, sir, he was.

Q Would you explain the circumstances, sir, surrounding that?

A Mr. L'Hommedieu was assistant road foreman of engines, and he refused to obey an order, an act of insubordination during the strike of 1972.

Q Was he afforded a company trial or hearing?

A No, sir, he was not.

Q What is his race?

A White.

Q Was Mr. Cossman afforded a company trial or hearing?

A No, sir.

Q What is his race?

A White.

Q Do you know Mr. R. L. Schluter?

A I do, sir.

Q Was he told to exercise his seniority?

A Yes, sir, he was.

Q What were the circumstances in that situation?

A He was assistant road foreman of engines; an act of insubordination, refused to obey an order, resulting in reduced in rank and returned to service.

Q Did you ascertain this from your files or from your subordinates?

A Yes, sir, I did.

Q Was he afforded a company trial or hearing?

A No, sir, he was not.

Q What is his race?

A White.

Q Do you know Mr. L. Matarazzo?

A I do, sir.

Q Was he told to exercise his seniority?

A He was, sir.

Q Would you explain the circumstances in that case?

A Mr. Matarazzo was a full road foreman of engines, and during the strike of 1972 he was given an order which he refused to obey. It was an act of insubordination.

Q Did you ascertain this from either your files or your subordinates?

A Yes, sir.

Q Was he afforded a company trial or hearing?

A No, sir.

Q What is his race?

A White.

Q Do you know Mr. C. R. Dunne?

A Yes, sir.

Q Was he told to exercise his seniority?

A He was, sir.

Q What were the circumstances in that case?

A Same thing. Relates to the other road foreman. During the strike of '72 he was given an order which he refused to obey, an act of insubordination.

Q Did you ascertain this from either your files or your subordinates?

A Yes, sir, I did.

Q Was he afforded a company trial or hearing?

A No, sir, he was not.

Q What is his race?

A White.

Q Do you know Mr. S. C. McCloud?

A Yes, sir.

Q Was he demoted within management?

A He was.

Q Could you explain the circumstances of that?

A Poor performance due to the fact that Mr. McCloud at the time was in charge of the department of the road foremen's department, and he was well aware of the situation and the feelings of the men and he didn't let it be known to the other managers exactly what the feelings were, resulting in when the other men were reduced, sent back to the ranks, he was reduced grade and cut in pay and given a lower job in management.

Q In other words, it was determined that he knew that the other people would not obey the orders ahead of time and didn't let management know?

A Yes, sir, he did.

Q Was he afforded a company trial or hearing?

A No, sir, he was not.

Q Do you know what Mr. McCloud's background is, his race?

A White.

Q Did you determine this from your files or from your subordinates?

A Yes, sir, I did.

Q Did you have personal knowledge of this?

A I was there when it was all going on, yes, sir.

Q Mr. R. R. Thomas; do you know Mr. R. R. Thomas?

A Mr. R. R. Thomas was an assistant road foreman of engines.

Q Was he told to exercise his seniority?

A He was, sir.

Q What were the circumstances in that case?

A Same as the other individual: strike of '72, refusal to obey an order.

Q Was he afforded a company trial or hearing?

A No, sir, he was not.

Q Did you ascertain this from your files or from your subordinates?

A Yes, sir, I did.

Q What is Mr. Thomas' race?

A White.

Q Do you know a Mr. M. J. Sichinolfi?

A Yes, sir, I do.

Q Was he told to exercise his seniority?

A He was, sir.

Q What were the circumstances in that case?

A He was a full road foreman of engines. During the strike of '72 he refused to obey an order. It was an act of insubordination.

Q Was he afforded a company trial or hearing?

A No, sir, he was not.

Q You ascertained this from either your files or from your subordinates?

A Yes, sir, I did.

Q What is his race?

A White.

Q Do you know Mr. J. E. Kelly?

A Yes, sir, I do.

Q Was he told to exercise his seniority?

A Yes, he was, sir.

Q What were the circumstances in that case?

A Mr. Kelly was assistant air brake examiner and assistant road foreman, and there was an act of insubordination during the strike of '72.

Q Did you determine this from your files or from your subordinates?

A Yes, sir, I did.

Q Was he afforded a company trial or hearing?

A No, sir, he was not.

Q What is Mr. Kelly's race?

A White.

Q Do you know a Mr. F. J. Mott?

A Yes, sir, I do.

Q Was Mr. Mott told to exercise his seniority?

A Yes, sir, he was.

Q What were the circumstances in that case?

A Poor performance.

Q What was his position at the time?

A Assistant trainmaster.

Q What was the nature of his poor performance?

A Mr. Mott worked directly under me at the time as I was a passenger trainmaster, and he worked for me as an assistant out in Babylon, and he was in grade about nine months. It's lackadaisical attitude, refusing to complete assignments.

I wrote an efficiency report up on him, resulting in his being sent back to the ranks -- rather, being reduced in a managerial position, and he went back

to the craft he came from.

Q Was he afforded a company trial or hearing?

A No, sir, he was not.

Q What was his race?

A White.

Q Do you know Mr. E. D. Lawrence?

A Yes, sir, I do.

Q Was Mr. Lawrence told to exercise his seniority?

A He was, sir.

Q What were the circumstances in that case?

A Poor performance. He was a chief trial officer, an assistant trainmaster at the time, and due to his lackadaisical way of handling various company trials results in cost to the company of the loss of time.

Q Was Mr. Lawrence afforded a company trial or a hearing?

A No, sir, he was not.

Q What is his race?

A White.

Q Do you know a Miss L. F. Duryea?

A Yes, sir, I do.

Q Was she told to exercise her seniority?

A She was.

Q What were the circumstances in that case?

A She was an assistant wage examiner. It was her job to process claims by the various labor crafts, trainmen, engineers and other represented employees of the transportation department, and failing to do so resulted in a loss of money to the company, and she was sent back to where she came from for poor performance.

Q Was she afforded a company trial or hearing?

A No, sir, she was not.

Q What was her race?

A White.

Q Do you know Mr. R. R. Landsberg?

A I do, sir.

Q Was he told to exercise his seniority?

A He was, sir.

Q What were the circumstances in that case?

A Mr. Landsberg was an assistant trainmaster. Due to his lackadaisical attitude, continuous reporting sick, not completing his assignments as he was told to do, he was told to exercise his seniority.

Q Was he afforded a company trial or hearing?

A No, sir, he was not.

Q What is his race?

A The writeup I received from Mr. Tiegen is just a broad topic on the incident in New York. It was -- I picked the information up to the fact of what Mr. Harris had said to Mr. Tiegen, but in the report --

Q And in fact niether Mr. Tiegen nor his statement said that Mr. Harris claimed everybody was lying, did it?

A That's right, sir.

Q Later that morning, after having called Mr. Gaynor at home at 7:00 or 8:00 o'clock, you met with Mr. Gaynor?

A That's right, sir.

Q At that point he told you, and you asked him to get writeups from the yardmaster, the stationmaster, C-Tower and A-Tower?

A Yes, I repeated my orders I gave to Mr. O'Brien that morning.

Q You didn't think you could make a fair decision as to who was at fault for the delays until you had all these facts?

A That is right, sir.

Q Now, the writeups you asked Mr. Gaynor for that morning were the writeups from the men involved?

A That's right, sir.

Q You didn't ask Mr. Gaynor to write a report, did you?

A No, I wanted it from the men involved.

Q The only time you asked Mr. Gaynor for the report was at midnight on November 11 after he had called you at home and told you that he had removed Harris?

A That is correct, sir.

Q You, during this period of time while you called him up the next day and said you wanted the reports from the men involved, you weren't pressuring him to write a report, were you?

A I wanted a report from the individuals involved.

Q But not a report from Mr. Gaynor?

A No, from the individuals involved.

Q You called Mr. Gaynor at 7:00 or 8:00 in the morning at home.

It's not your normal procedure, whenever there is the delay of a couple of trains, to call Mr. Gaynor at home, is it?

A No, sir.

Q Thank you.

Now, you spoke to Mr. Gaynor the next day on November 11; is that correct?

A Yes, sir.

Q And you asked Mr. Gaynor if he had the reports?

A Yes, sir.

Q He said he had all the reports except Mr. Harris'?

A Right, sir.

Q He sent you those writeups that day?

A I had one from C-Tower and one from the yardmaster.

Q Although Mr. Gaynor told you that he had all the reports, he in fact didn't send you a report from A-Tower, did he?

A No, sir, I never did see the report from A-Tower.

Q And, in fact, you never did receive a report from C-Tower, did you?

A I'm pretty sure there is a writeup from the operator, yes, sir.

Q But if you received that report you would have given it to your attorneys, right?

A There were two reports I received. I'm pretty sure one was from Lehr and one was from C-Tower.

Q Any reports you received you gave to your

but something like that.

Q But your recollection is that it was only one or two lines and it didn't go into the story of the reasons for the delay; is that right?

A Right, sir.

Q And the only thing that you recalled it stating was the time that the line went out?

A No, there was some other things in regards trains, and whatever was reported by Mr. Harris on the log that day.

I can't tell you what it said; just roughly.

Q Basically, it was too short, and that's why you wanted a --

A Yes, sir.

Q -- full statement from Mr. Harris?

A That is right.

Q While Mr. Harris' report in the log was too short, the statements that you received from C-Tower and Mr. Lehr on November 11, they were long enough; right?

A The reports that I read relate to what the incident was.

Q Were they long enough?

A Gave me the facts, yes, sir.

Q They were long enough?

A Yes.

Q I don't have a copy of C-Tower report. I probably have a copy of Mr. Lehr's report.

I'd like to show it to you. Is this a copy that you recall receiving from Mr. Lehr?

A Yes.

Q I would also like to show you Mr. Harris' report in the log book that Mr. O'Brien read to you on the morning of the 10th. It's about the same length as Mr. Lehr's report, isn't it?

A Yes, sir.

Q It's about as complete as Mr. Lehr's report, too, isn't it?

A It's similar, in the vicinity, yes, sir.

Q I suppose Mr. Harris' report to you in the log was longer than the report you never received from A-Tower.

A I never did see the report from A-Tower. There was a report from --

Q So you don't know how long that report was?

A No, sir, I don't.

Q You received another report from Mr. Gaynor on the morning of November 12?

A I did, sir.

A All I can go on is what's in the report.

Q And that's not in the report, is it?

A No, it's in the writeup from Mr. Tiegen itself.

Q You didn't know that C-Tower in fact never told Harris that line 3 would be closing after train 400 departed, did you, because that wasn't in the report?

A No, sir.

Q You didn't know that C-Tower said that the only communication he heard to Mr. Harris was made by Mr. Lehr over the squawk box at about 12:18? That's not in the report, is it?

A I can only go by what's presented to me here and the reports that I had.

Q You didn't know that, then?

A No, sir.

Q You didn't know that Mr. Lehr said he never made any communications to Mr. Harris at that time because it's not in the report?

A It's news to me, sir.

Q You didn't know, in any event, that C-Tower said they never heard Mr. Harris respond to the communication that Mr. Lehr says he never made?

A I have no knowledge of it.

1 Q You didn't know that Mr. Lehr's practice
2 was to check with C-Tower for foulings whenever he has
3 ten cars on track 16 or eight cars on track 17 because
4 they have to get all the way west to clear? You didn't
5 know that was Mr. Lehr's practice, did you?
6 A Yes, sir, I do.
7 MR. STOKES: I object to the question.
8 It's predicated on facts that are not of record.
9 THE COURT: Sustained.
10 Q Do you know what Mr. Lehr's practice is with
11 regard to checking on foulings on tracks 16 and 17?
12 Does --
13 A It's the general practice of yardmasters
14 to check to see if the circuits are cleared on the east
15 end. Normally, C-Tower would notify them that the crew
16 has failed to stop short or the equipment has to be
17 pulled up.
18 Q And C-Tower would normally do that when the
19 train pulls in the station; right?
20 A Either to the yardmaster or to the station-
21 master.
22 Q At the time it comes into the station or
23 closely thereafter?
24 A Yes, sir.
25

Q At about midnight on November 11 Mr. Gaynor called you; right?

A That's right, sir.

Q You were asleep at the time?

A I was, sir.

Q Mr. Gaynor told you that he had removed Mr. Harris for insubordination for not filing a report; right?

A He told him to exercise his seniority.

Q And he told you the reason that he directed Mr. Harris to exercise his seniority was for insubordination for not filing a report; right?

A That is correct.

Q And the reason that you approved -- let me back up a second.

At that point you approved the decision?

A Not necessarily. I used the word "fine," more or less to his actions he's taken and to give me a complete writeup in the morning so I could evaluate it.

Q You are saying that you didn't approve it at that time when he called you?

A I said "fine" to the man over the phone, meaning more or less I approve of his action, but at the same time I want a written report in the morning giving me all the facts.

Q Then the next morning you approved it a second time?

A That is right.

After I evaluated the writeup from Mr. Gaynor.

Q At that time had you come to a conclusion as to whether or not Mr. Harris was responsible for the delays that night?

A The question here isn't --

Q My question, Mr. Dixon, is at that time had you come to a conclusion as to whether or not Mr. Harris was responsible for the delays that night?

A No, sir.

Q The reason that you approved Mr. Gaynor's decision at midnight on November 11 was that, in your own words, "When a man fails to write a report, that's an act of insubordination and I won't tolerate it."

A That is correct, sir.

Q When you spoke to Mr. Gaynor at midnight he told you, did he not, that Harris had said that he had had some personal problems that day?

A If I remember correctly the conversation, he did say personal problems. It wasn't until the next day that it turned out to be some type of medical or dental problem he had.

as to the nature of Mr. Harris' dental problems?

A I took it for granted he did when he stated that Harris had told him about his -- I think it was a dental or medical problem he had, yes.

Q You never inquired of Mr. Harris --

A No, I did not; no, sir.

Q You will also admit, won't you, Mr. Dixon, that Mr. Harris may have had sufficient reason for not having the written report in his hand that day, but that you don't really know what his problems were and whether or not they were sufficient?

A I do.

Q Is that correct?

A Yes, sir.

Q You basically felt that he might have had a reasonable excuse for not preparing it during the day, but that it had been 48 hours and you thought you should have the report?

A Yes.

Q 24 hours is one thing, but 48 hours is another?

A Right, sir.

Q Mr. Harris called Mr. Rizzacasa on the morning of November 11, did he not?

A Yes, sir.

Q Mr. Landsberg was an assistant trainmaster that at one time worked on the shift with Mr. Harris; right?

A Yes, sir, he was.

Q Mr. Landsberg never made any complaints to you, or you know of no complaints by Mr. Landsberg about Mr. Harris' performance on the job, do you?

A They were reported to me by Mr. Gaynor.

Q I believe that Mr. Landsberg was encountering difficulties at Penn Station; is that right? He was laying off sick, not covering his assignment, calling off short of time, and looking for excuses; is that correct?

A That is correct, sir.

Q At this point you didn't remove him from managerial service; you moved him out of New York to Jamaica Station where he worked as an assistant trainmaster?

A I moved him out to the east end of the Island, yes, sir.

Q Where he worked as an assistant trainmaster?

A That's right, sir.

Q You did that hoping that, in light of his

long service, he would be able to do a better job out there?

A That is correct, sir.

Q How long was Mr. Landsberg's service, do you know?

A I believe Mr. Landsberg has about twelve years of service, sir.

Q Do you know how long Mr. Harris' service has been?

A About twenty-five years.

Q You never moved Mr. Harris out of New York, I suppose, to see if he could, in light of his long service with the railroad, be able to do a better job out there?

A I believe Mr. Harris was offered the opportunity when other positions of assistant stationmaster opened up to move out of New York and declined it.

Q When you moved Mr. Landsberg out, it wasn't because Mr. Landsberg wanted to move out, it was because he was having problems and you, as a disciplinary action, moved him out there to see if he could do a better job; right?

A That is correct, sir.

Q You never did that with Mr. Harris?

A No, sir.

Q Going back to the list, why don't we try to take it in chunks, speed things along.

The first four on the list are all train dispatchers by the names of Dolmat, Howell, Roberts, Lyons; that's it.

The reasons for removing those individuals from service was their unsatisfactory performance, which included a pattern of failure to report delays, poor performance all around, the misrouting of trains, the delay of trains unnecessarily, and the failure to make various reports on late trains; is that correct?

A That's right, sir.

Q You did not make the decision to remove them from service, did you?

A No, sir.

Q You don't know the circumstances under which they were actually removed from service, as far as whether or not they met with their superior and what was said to whom, et cetera?

A No, general conversation; no, sir.

Q You weren't at any of those meetings, if they did exist?

A No, sir.

Q You don't know whether or not any meetings

1 did exist with those people?

2 A No doubt there were meetings with their

3 immediate superior, yes, sir. But I don't know what the

4 conversations were.

5 Q Do you know for a fact that there were

6 meetings, or are you just basing this on your general

7 experience?

8 A General experience.

9 Q They were basically handled by the superintendent of train movement, these four train dispatchers?

10

11

12 A That is right, sir.

13 Q The next one on the list is Mr. Roman who was

14 an assistant trainmaster. He was fired for unsatisfactory

15 performance as an assistant trainmaster, which included

16 his failure to perform various assignments and his failure

17 to make various writeups he was supposed to submit, and

18 also failure to respond to calls from the movement

19 bureau; also that his hours were being cut short and that

20 he was going home without telling anybody.

21 A That's right, sir.

22 Q Other than those generalities, though, you

23 don't have any firm recollection? You weren't personally

24 involved in his removal?

25 A Mr. Roman, I was personally involved.

Q Anything else that he did other than those things that I have just mentioned?

A Just a poor performance in general.

Q Now, Mr. Satter was the assistant superintendent of train movement back in '72; is that correct?

A That's right, sir.

Q He was responsible for a derailment of a train?

A That's right, sir.

Q A switch was thrown under a moving train?

A That is right, sir.

Q That resulted in personal injuries, substantial damage to equipment, and also closed down Brooklyn for a couple of days?

A That's right, sir.

Q Now, Mr. Satter wasn't told to exercise seniority?

A He was reduced.

Q He went to a lesser management position?

A That's right, sir.

Q Mr. Drumm was removed, you say, for failure to qualify on the book of rules and physical characteristics?

A That is correct, sir.

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Q You expect every manager of the assistant trainmaster level or above to be able to take over the running of a train, and therefore to be qualified on the book of rules and physical characteristics?

A That is correct, sir.

Q Mr. Drumm refused simply to take the exams?

A That is right.

Q If he had taken the physical characteristic exams and filaed it, would he have been removed from service for failing the exam?

A He would have been removed more of less due to the fact that he wouldn't be able to work in that capacity until he was able to pass the book on the physical characteristics.

Q He would have been removed from service as assistant trainmaster until he passed it?

A That's right, sir.

Q Now, has it always been the policy to have your assistant trainmasters qualify by taking the physical characteristics exam?

A Yes, sir.

Q I see that Mr. Drumm was removed on December 31, 1974, which, if you will recall, was shortly after our first appearance before Judge Gagliardi when

1 require him to take an examination?

2 A That is right, sir.

3 Q Because of his length of service on the

4 railroad?

5 A No, sir, because of where; he was restricted

6 to work within the area.

7 Q Which was?

8 A Jamaica area and the New York area.

9 Q Well, if you had to work as a trainmaster in

10 Jamiaca and New York, isn't it possible that you might have

11 to go down to the tracks and remove the train?

12 A He was also a block operator.

13 Q Isn't it possible that he would have to go

14 down on the tracks and remove the train?

15 A Yes, sir.

16 Q Yet you didn't require him to pass this

17 physical characteristics exam until December of '74?

18 A Yes, sir.

19 Q The next ten individuals on this exhibit

20 were all fired for reasons stemming out of a fifty-some

21 odd day strike at the railroad; is that correct?

22 A That is correct, sir.

23 Q All of these eleven individuals, except

24 Mr. McCloud, were fired for insubordination?

25

A That is correct, sir.

Q Because they refused a direct order to go out and move some trains?

A That is correct.

Q Essentially, they refused to break the strike?

A That is right.

Q Mr. McCloud, on the other hand, while not refusing to break the strike, knew that his men were going to refuse to break the strike and didn't report it to his superiors, and in effect, perhaps, was sympathizing with the strikers; is that correct?

A That is right, sir.

Q I mean, that's the reason he was removed?

A He was reduced in grade.

Q He wasn't removed from managerial service; he was reduced to a different job in managerial service?

A That's right, sir.

Q Mr. Mott was removed as a result of an efficiency report that you wrote?

A That is right, sir.

Q Prior to becoming an assistant trainmaster in May of 1969, he had held a management position in another department?

A No, sir.

Q Mr. Lawrence, I believe you said, was chief trial investigating officer, and that he was negligent in the preparation of cases, and management lost a lot of trials as a result of that, and that this was the reason for his being demoted; is that correct?

A That is correct, sir.

Q Didn't Mr. Lawrence also try to organize the assistant trainmasters into a union?

A Not that I know of, sir.

Q Now, Miss Duryea, who is last on our list, worked for the management of manpower as a wage examiner; is that correct?

A That's right, sir.

Q She failed to process various claims that resulted in lost time and money and was fired by Mr. Schaffer; is that correct?

A That is correct.

Q You have no personal knowledge of the facts surrounding her being demoted, do you?

A No, I do not.

Q Now, in deciding whether or not to remove someone from managerial service, the railroad doesn't have any objective standard which it applies; it is all

the subjective evaluation of the management employees. Is that correct?

A That's correct.

MR. STOKES: Objection.

Q In deciding what discipline --

THE COURT: Overruled.

Q -- to give to someone --

MR. HOLWELL: Pardon, your Honor.

THE COURT: He made an objection. I ruled on it. That is the usual procedure.

Q In deciding what discipline to give someone, you don't take into account the fact that an employee is a represented employee as opposed to a managerial employee, do you? That factor, in and of itself, does not figure into your determination as to what discipline to give somebody?

A Represented employee has a hearing.

Q I understand that he has a hearing. I'm not talking about what procedures you give him, but in the end what you finally decide to do to him. The fact that he is a union employee as opposed to a managerial employee doesn't mean that he is going to get treated more harshly or more leniently, does it?

A He can get treated more harshly than a managerial

1 employee, sir.

2 Q I understand that he can, but what I'm saying

3 is that, by virtue of the fact that someone is a union

4 employee as opposed to a managerial employee, that factor

5 will not lead you to give him a different discipline;

6 the punishment fits the crime, right?

7 A That's right, sir.

8 Q Now, when you tell a management employee

9 to exercise his seniority, I suppose that that means that

10 the employee is going to lose his chances for promotion

11 to future management positions; is that correct?

12 A Possibly, yes, sir.

13 Q You don't yourself personally work with Mr.

14 Harris?

15 A No, sir.

16 Q And you have no personal knowledge of Mr.

17 Harris' performance except for certain written reports

18 that you have gotten from Mr. Gaynor, and I believe maybe

19 one from Mr. Rizzacasa; is that correct?

20 A That is correct, sir.

21 Q You have spoken to Mr. Gaynor about other

22 assistant stationmasters failing to submit reports, haven't

23 you?

24 A Yes, sir.

25

Mr. Harris exercised poor judgment that evening.

Did you come to the conclusion that anybody else had exercised poor judgment that evening?

A No, sir. I believe the yardmaster in question also used poor judgment that night.

Q Because he was the one that originally routed the two trains to come in behind each other?

A The yardmaster has nothing to do with routing the trains.

Q Who does that, A-Tower?

A A-Tower.

Q Doesn't the yardmaster and A-Tower get together to decide what tracks a train is going to come in on and whether or not to bring him in on this line or that line?

A There is a possibility whatever he is going to turn the equipment for, he could talk to A-Tower. He's going to use equipment of 803 for so-and-so, or train 1605 for something like that is right.

Q A-Tower doesn't just decide to bring in a line. He confers with the yardmaster; is that correct?

A And the stationmaster, sir.

Q A-Tower will confer with the stationmaster?

A That's right.

Q In other words, the track change or closing up of lines?

A That's right.

Q That's part of A-Tower's job; right?

A That's right.

Q So, on the evening of September 16, in addition to Mr. Harris, the yardmaster and A-Tower also knew that these two trains were going to come in against traffic, one behind the other, on line 3; right?

Is that correct?

A I don't follow you on the question, sir.

Q Well, as I understand it, there was a line going out, line 2.

A Right.

Q Okay. And that's the income line.

A Line 2 is the incoming line to New York.

Q So, what happened was that there are two trains, train 803 and train 1605.

A Right.

Q After consulting with the stationmaster and the yardmaster, they were directed to come against traffic, one behind the other, in line 3, which is normally the outgoing line.

A That is correct, sir.

A That is correct.

Q His principal duties are to supervise the running of the entire station to manipulate crews and equipment, is that correct?

A Yes.

Q Communicate with engineers, is that correct?

A Oversee the operation itself.

Q Also on the job at that time is Mr. O'Brien who is the assistant to the terminal superintendent.

A That's right, sir.

Q Has his title recently been changed to assistant to terminal trainmaster?

A It is in the process of being changed right now.

Q And Mr. O'Brien's principal duties while on the job is to handle the public, take messages to the crew, assist Mr. Rizzacasa?

A Yes, sir.

Q The assistant stationmaster on duty during this first trick is a Mr. Scott, is that correct?

A Yes, sir.

MR. RUBIN: Excuse me, your Honor. Is this all during the first trick we are talking about?

MR. HOLWELL: Yes.

Q And the principal duties of Mr. Scott is to

keep identity of the trains that come in and out of Penn Station during that time, is that correct?

A In general, yes.

Q In addition to that I assume he assists Mr. O'Brien who is assisting Mr. Rizzacasa?

A That is correct, sir.

Q Later on in the morning the stationmaster comes in about 10:00 or 10:30?

A Roughly, yes, sir.

Q He works through the afternoon rush hours?

A That is correct.

Q The stationmaster, when he comes in, he sorts the mail, he relieves the assistant stationmaster for lunch, he coordinates Allied Cleaning. If there is a problem in the morning he will assist the terminal trainmaster in handling of crews and equipment. For example he may go down on the platform and so forth.

A Yes, sir.

Q He generally has those responsibilities?

A Yes.

Q A road man then comes in at about the same time, doesn't he?

A Yes, sir.

Around noontime.

duty.

Q Now the assistant stationmaster that is on the job on the morning shift, Mr. Scott, he is relieved at 3:00 o'clock in the afternoon by assistant stationmaster Albertus, right?

A That's right, sir.

Q And the assistant stationmaster Albertus' prime function similar to Mr. Scott's is to keep the identity of trains?

A Yes, sir.

Q The assistant trainmaster, Mr. Bloomfield, he works down on the platform to assist the conductors to close the doors, to assist any train repairs, he works on track 18 and 19, right?

A He is normally through the station, at a given time during the commission hour he may be assigned to a specific platform. But after commission hour he covers the station in general as far as Long Island side is concerned.

Q The same is true with assistant trainmaster Battistini is generally throughout the station but during heavy periods he will be down on track 13 or 14 doing the same job as Mr. Bloomfield?

A That is correct, sir.

THE COURT: You should rephrase it.

MR. RUBIN: Excuse me, your Honor?

THE COURT: Rephrase the question. I will permit you to develop what you are trying to develop but rephrase the question.

BY MR. RUBIN:

Q Did you have any other reports from C Tower on the morning of the 10th other than this report?

A I was pretty sure I had a report, definitely sure that I had a report from Mr. Gaynor had supplied me with a report sometime after the 10th on the operators at C Tower.

Q You stated during your cross examination that there were other instances in which stationmaster failed to submit reports, is that correct?

A That is correct, sir.

Q What reports were these?

A Well, when I questioned Mr. Gaynor on various activities that went on around Penn Station, then I would ask to submit a writeup.

Q In other words, you were not satisfied with the report in the log, is that correct?

A That is correct.

Q Has any other assistant stationmaster ever failed to submit a separate written writeup when ordered?

Dixon.

(Witness excused.)

MR. STOKES: We call Mr. Zeman.

E D W A R D J. Z E M A N, called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. STOKES:

Q Mr. Zeman, by whom are you employed and in what capacity?

A I'm employed by the Long Island Railroad, and I am manager of employee services.

Q How long have you been employed by the Long Island Railroad?

A Since February of '64.

Q That has all been in the personnel department?

A Yes, that is correct.

Q Have you any responsibility for cases before the Division of Human Rights, the New York State Division of Human Rights?

A Yes, I do.

Q Do you have any responsibility for the EEOC reports filed by the Long Island Railroad?

A Yes, I do.

Q Now, during the past year did you have any occasion to check on the validity of the EEOC reports filed by the Long Island Railroad?

A Yes, I had.

Q Will you explain how it came about?

A Well, coincidental to a complaint filed with the State Division of Human Rights I had to produce some records concerning minority participation in certain crafts on the railroad.

Upon reviewing the data that we had on file I noticed that it was quite erroneous, and a number of blacks were omitted. Therefore, I had to institute an audit eventually to check on the record itself.

Q When was this audit held?

A To the best of my recollection it would be sometime in September that we received the material. I would say September of '76.

Q When did you get the results of it?

A Sometime in November, before Thanksgiving.

Q What did this audit of the EEOC report show?

A Well, it showed a gross misrepresentation of the total number of blacks in our work force as compared to the last EEO 1 report placed on file with the Federal Government.

Q In other words, the number or the black participation in Long Island employment was being understated?

A Yes, it was.

Q For 1976 what was the amount of the understatement?

A I would say about 200 people.

Q As a result of this audit did you make any further checks to see about reports filed on prior years?

A Yes, we tried to research back with regard to the count itself, and did research some individuals on a random basis.

Q What did you find on the basis of your random sample and research?

A Well, it showed that in prior years the correct count of blacks that I know that are presently employed on the railroad were not counted in those reports.

Q Approximately how many names would this be?

A At least 130.

Q This would go back how far?

A Early '50s.

Q So, in other words, from your preliminary studies you can state with reasonable certainty that all of the EEOC reports filed by the Long Island since 1966 when these reports were first started substantially understate the black participation in the Long Island Railroad?

MR. HOLWELL: Objection to the form of the question, your Honor.

THE COURT: Well, I guess you have to rephrase it. It is more a statement than a question, but you could ask the question in the proper form.

Q Can you state any definite conclusion from your preliminary studies or with reasonable certainty as to the accuracy of the EEOC reports filed by the Long Island Railraod since 1966?

A The best way I could answer that question would be to indicate that the reports filed represented at least a minimum participation of blacks and minorities on our property.

Q Your preliminary studies indicate that the actual participation of blacks would be what?

A Would be significantly higher.

Q Mr. Zeman, I want to read you certain statements from the record in this case. Back in 1975 proceeding in regard to Mr. Harris at page 90, line 20, Mr. Harris was asked, "Were you the first black man ever to hold a management position on the railroad?

"A To my knowledge."

At page 222 of the 1975 record Mr. Holwell:

"The materiality, your Honor, is to establish

that management were in an all white category of jobs now, and certainly when Mr. Harris applied for the job."

And at page 323 of the present record made here in this latest proceeding.

"MR. HOLWELL: The statistics were the same thing in management. You have probably less than 2 per cent and prior to Mr. Harris there was zero per cent in management."

Now, Mr. Zeman, based upon your personal knowledge of blacks employed by the Long Island Railroad in management positions are these statements true?

A Not correct.

MR. HOLWELL: May we take one at a time, your Honor?

THE COURT: Well, or any of them.

Are any of them true.

Is this the first one true?

THE WITNESS: No.

THE COURT: Is the second one true?

THE WITNESS: No.

THE COURT: Is the third one true?

THE WITNESS: No.

THE COURT: I think there was a fourth, I forget.

MR. STOKES: Only three, your Honor. That last one did, I say, page 323 -- it is page 329.

Q From your personal recollection can you name some blacks in Long Island Railroad management positions prior to Mr. Harris' appointment in 1972.

A All right. Henry Cross, Nathan Hale, Al Donogal a fellow called Blackey. Mr. Wilson and a Mr. Walker.

Q I show you certain photocopies, Mr. Zeman, and I ask you whether those are photocopies that you made of the individuals, of the service records of the individuals you just named?

A Yes, these were secured from the records department, that is correct.

Q That is the record department of the personnel department of the Long Island Railroad?

A Yes.

Q Records kept in the regular course of business?

A Yes.

MR. STOKES: I show them to counsel and ask that they be marked for evidence.

MR. HOLWELL: Your Honor, these are documents that were taken out of the files. We like the opportunity to look at the entire file. I don't know if these are -- these are certain service record cards.

THE COURT: You want to ask him about it.

VOIR DIRE EXAMINATION

BY MR. HOLWELL:

Q Are these the complete personnel files on the individual?

A No.

Q These are just the --

A Service record cards of the individual.

MR. STOKES: And they are, of course, only being offered to show the date of appointment of the individuals.

MR. HOLWELL: No objection to that extent.

THE COURT: All right, received.

(Defendants' Exhibit N received in evidence.)

xx

BY MR. STOKES:

Q Referring to Exhibit N, Mr. Zeman, for each of the individuals named will you indicate just of the various positions that these individuals held which were the management positions?

A All right.

Q And at what time they were appointed?

A Henry Pierce Cross on July 25, 1968 --

THE COURT: What position?

THE WITNESS: Assistant supervisor of training. Willy Fred Wilson, Sr., supervisor --

THE COURT: When appointed?

THE WITNESS: Excuse me?

THE COURT: When was he appointed?

THE WITNESS: Why, yes, excuse me, your Honor, I have to look. It looks like 7/18/62.

THE COURT: Position?

THE WITNESS: Supervisor of special services.

Altamont Oswell Donegal, 8/24/67, inspector MW.

John Francis Walker, 11/21/66, project engineer.

Nathan Robert Hale, 3/25/68, supervisor accounts payable and accounts receivable.

Woodrow Edward Blackey, 2/1/67, MW inspector.

Q Referring again to these number of these individuals received further promotions in management after that, did they not?

A Yes, they did.

MR. STOKES: I won't go through that, your Honor. The exhibit will speak for itself. I have no further questions.

THE COURT: All right.

CROSS EXAMINATION

BY MR. HOLWELL:

Q Mr. Zeman, you said you undertook an audit in September, '76. That audit was with respect to what year or years?

A The current year.

Q Which would be 1976?

A 1976.

Q You said that that showed a gross misrepresentation of the total number of blacks, is that correct?

A That's right.

Q Did that vary from job to job or was that across the board?

A Well, it is the full spectrum of employment.

Q I know, but the misrepresentation, did that appear in certain crafts and not in other crafts?

A No, I hadn't noticed any special trend in any one particular area.

Q This was a written document that you prepared?

A It is a written document I received, yes.

Q Then you said also you started to go back and look into other years, is that right?

A To make the conclusion that it preceded into the previous years.

Q You went ba.k and looked at other years?

A Yes, in other words, if an individual appeared in the year '76, and on a random basis I went back to previous years' reports because this is a current employee, and in these cases the individuals didn't appear, so it was erroneous in the previous year, but bear in mind this is a preliminary report.

Q This checking back that you undertook, you had some records on that also, right?

A Oh, yes.

Q How far back did you check?

A Well, I can only use the active population, so some of the individuals who are listed as being erroneously noted, go all the way back to 1950, '51. I have no other records to refer back to, but only the live population that I have now.

Q You said that you found at least 130 names--

A I would say at least 130 blacks that were so effected that were not included in the report.

Q They were in the '76 report, weren't they? I mean their names were there.

A Only in the report that I had generated from the audit.

Q In the first report that you had, right, where it was inaccurate --

A Let me answer your question this way:

We are required to file an EEO 1 report and this particular report was generated through normal course of business. When I received questions, and I noticed errors in the particular source documents that I was using on this state case, I proceeded to have a complete audit of the company and pick up codes on that basis, so I could only work from the active population.

So if someone were to have terminated prior to that, they wouldn't be, they wouldn't show; for any reason.

Q But essentially what you did is you had an individual's name there, and he had the wrong code next to it as opposed to having the individual not showing up on the list.

A It is the same thing.

Q It is the same thing?

A Exactly.

Q Well, could you have whites that didn't show up on the list, too?

A Yes, there were some.

Q There were whites that didn't show up on the list as well as blacks?

A Yes.

MR. HOLWELL: At this time, your Honor, we would request the production of these as the best evidence and move to strike Mr. Zeman's testimony as to grossly inaccurate figures. The document will speak for itself. The railroad's EEOC are business records. To the extent that the railroad wants to realize them at this point they are certainly allowed to do so --

MR. STOKES: I think Mr. Zeman has indicated that this is something that has just recently been discovered. It is a preliminary study. He has given his testimony as to what he has found on it and I think his testimony stands.

THE COURT: Do you have the records?

MR. STOKES: I don't have any records of it with me, your Honor.

THE COURT: Do you have the records?

THE WITNESS: At the office what we used.

MR. STOKES: We are happy to let them come to see it.

THE COURT: That is all he asked. I won't strike his testimony but you will get an opportunity to look at the report.

MR. HOLWELL: We will get an opportunity to look at the record but we won't get an opportunity to question

Mr. Zeman.

THE COURT: If you have to question him again why I will be here for two months in this courtroom. Will you make them available?

THE WITNESS: Certainly.

THE COURT: Can you pick them up tomorrow and look at it?

THE WITNESS: Sure.

THE COURT: All right, do it.

BY MR. HOLWELL:

Q You said that you could recall six black workers who held management positions prior to 1972, was it?

A That's right.

Q How did you come across these six individuals?

A Well, I had personal contact with, I know them for years.

Q You are in charge of the personnel department or you work in the personnel department?

A Throughout the years we have business dealings from one degree to another, and these individuals I know of.

Q You worked in the personnel department, though?

A Oh, yes.

Q You know of any other black workers other than

these?

A Prior to 1972?

Q Yes.

A Offhand, no.

Q About what percentage of the total management population would those six workers comprise assuming that they were on the job all at the same time?

A I don't know, because each of their employment dates and their appointment dates are at different times.

Q But assuming for the benefit of the doubt that they all worked at the same time, those circumstances, would comprise I guess under 2 per cent of the management population, wouldn't they?

A Based on the audit that I have just done I couldn't even answer that question because I don't know if it is, if it would be higher or lower.

Q Could you tell me that six people would be under 2 per cent of the management population?

A No, I couldn't say.

MR. HOLWELL: We have no further questions, your Honor, until such time as we have questions arising out of the documents.

MR. STOKES: I have a couple of redirect here, your Honor.

REDIRECT EXAMINATION

BY MR. STOKES:

Q Mr. Zeman, in response to Mr. Holwell you indicated that this audit had indicated there was some whites, approximately, some whites that would have been misnumbered?

A Oh, 12, 13.

Q As opposed to 200 black?

A As opposed to 130 odd black.

Q You have named six individuals that you personally know that were in black management positions prior to 1969 --

THE COURT: No, they were blacks in management positions.

MR. STOKES: I get my tongue mixed up here.

Q Could there have been other blacks that you do not know about that held management positions prior to 1969?

A Certainly.

MR. STOKES: I have nothing further.

THE COURT: You may step down.

(Witness excused.)

THE COURT: Next witness.

MR. STOKES: Our next will be Mr. McGowan.

THE COURT: I believe they were going to stipulate

Do you have any specific recollection of failing to turn in four or five reports?

A No, I don't.

Q Do you have any recollection whatsoever of any incident in which you were asked to respond to a question which Mr. Gaynor might be referring to when he says he recalled you turning in some four or five reports over the last year?

A Well, I do recall sometime in about December of 1975 coming in one night, and Mr. Gene Pico was then the assistant trainmaster working from 3:00 to 11:00 or 12:00, 3:00 to 12:00, came in. He gave me a letter from Mr. Gaynor stating that I had recorded the time that line 1 had returned to service, but failed to do so in regards to the time it was taken out of service, and I explained to him that at that time that line 3 was in service, and I was focusing my attention on line 3 at the time that line 1 went out of service, which was handling Amtrak's operation.

I recall that I had recorded on my station-master's sheet, but then it was, I forgot to record it on the, in the book, in the log book that morning.

Q Did Mr. Pico say anything further to you about this incident?

A No, he accepted the explanation and I haven't heard anything from it since.

Q Or anything from Mr. Gaynor since?

A No, I haven't heard anything from Mr. Gaynor.

Q I show you a document, a copy of a document dated December 24, 1975 to JJH from JJGaynor, terminal superintendent, to EEHarris, assistant stationmaster.

I ask you, is this a copy of the document that Mr. Pico handed to you that you have just been discussing?

A Yes, it is.

MR. SOLLIS: I'd like to offer that in evidence.

MR. STOKES: May we see it?

(Pause)

MR. STOKES: I have no objection.

MR. SOLLIS: Your Honor, we are offering this for the limited purpose of a copy of what Mr. Harris received and we do not vouch, nor do we contend that its contents are necessarily accurate.

xxx (Plaintiffs' Exhibit No. 7 was received in evidence.)

Q Do you have any other recollection of any other incident Mr. Gaynor might be referring to when he says

you failed to turn in some 405 reports over the last year that he requested?

A No, only one possibly, and this was not from Mr. Gaynor. It was from Mr. Ralph Diaz, the stationmaster who requested that I have a report for Mr. Rizzacasa, trainmaster, the following morning, and at that time when Mr. Rizzacasa came in I was in the process of making the report out, and he started asking me questions about the delay of the two trains the preceding night.

I explained to him what had happened during that period and he accepted it. He said he would take care of it and that was the end of that. I hadn't heard anything further from it.

Q Mr. Harris, I show you a copy of a letter which appears to be signed by R. Diaz, stationmaster, addressed to Mr. E. E. Harris, assistant stationmaster, dated 9/16/76, and I ask you if this is a copy of the letter from Mr. Diaz that you have just been referring to.

A Yes, it is.

Q Have you heard anything further in connection with this incident?

A No, I haven't.

MR. SOLLIS: Mr. Stokes, I'd like to offer this into evidence.

[758]
5 dwmch Harris-redirect

MR. STOKES: I have no objection.

MR. SOLLIS: Again, your Honor, we are offering it not as proof of the contents, but as an indication of what Mr. Harris received.

xxx (Plaintiffs' Exhibit No. 8 was received in evidence.)

Q Mr. Harris, did there come a time when you obtained a report from your dentist in connection with the dental work that you have testified about during the course of this trial, dental work occurring on the evening of November 11?

A Yes.

Q I show you a document which you have provided me on the letterhead of Clarence Boone, DDS, and ask you if this is a copy of the document that you obtained.

MR. STOKES: I don't know why we need go into this, your Honor. We are not contesting that he went to the dentist.

THE COURT: Very well.

MR. STOKES: Mr. Harris testified he was at the dentist from 5:00 to 6:00. So we don't contest that.

MR. SOLLIS: In that case you have no objection to me offering it into evidence.

THE COURT: It doesn't make any difference.

are working now?

A No. I would have to grab whatever I can. They have cut the ushers' roster down drastically within the past couple of years, and I would only be able to hold very unpleasant jobs.

THE COURT: You say $30 less. Is that a week, a month or what?

THE WITNESS: Per week. I believe.

Q Can you tell me any other reasons why you want to hold onto your job as assistant stationmaster besides the pay?

A Well, besides the pay is that the first thing is that I'm an American citizen, I'm a veteran. I fought in World War II; my father in World War I. I'm a citizen of the State of New York.

I look around me and other citizens are moving up the line. There is no reason why I shouldn't.

And, in addition to that, an usher job which I would be able to hold today would be one that would entail that sometimes I stand up for three hours straight and I have a condition which -- varicose veins -- which that would produce a hardship on me.

In addition to that, the hours that I maintain as an assistant stationmaster complements my situation at

tell you precisely where 82 went out of line. In other words, when I, or when the stationmaster fills out that sheet --

Q You can't determine that from this --

THE WITNESS: -- it has a number there that says that 83 normally goes out of line 3, that would be crossed out and 1 would be placed on top of it.

THE COURT: The only accurate way we can ascertain what we are trying to do here is to take a look at the stationmaster's log, isn't it, really?

MR. RUBIN: I move the exhibit be stricken.

THE COURT: The stationmaster's sheet, that would let us know, would it?

THE WITNESS: Right.

THE COURT: Even though it may have gone out at 1:00 o'clock, the hold may have gone on fifteen or twenty minutes before then, or it may have gone on an hour before then; isn't that right? Even though, as a practical matter, it may have gone out an hour before, but that's possible, isn't it?

THE WITNESS: Yes, sir.

THE COURT: The only real significance we can get is if we could have the stationmaster's log coupled with this information that you have here; isn't that right?

A He said he was too busy on the night of the 9th to write it, and he was too tired in the morning to write it, and he was going to write it at home. But then when he came in he didn't have it with him. Then he mentioned something about a dental appointment somewhere in the late afternoon or early evening--I think it was around 6; I'm not sure--and that interfered with him writing the report, and he was unable to even have it when he came in. And then he indicated that he didn't think anybody would be requesting it when he came to work.

Q Did Mr. Harris indicate that he planned to write the report during the morning of November 12?

A He indicated that he would have it in the morning of November 12, which was not when it was requested.

Q Did Mr. Gaynor indicate to you whether he believed that Mr. Harris had been unable to complete the report?

MR. STOKES: Could I hear that question, please?

(Question read)

MR. RUBIN: That does not make any sense to me.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

FRANCES JOY CAPERS, et al., each individually and on behalf of all other persons similarly situated,	:	72 Civ. 3168
	:	OPINION
Plaintiffs,	:	
-against-	:	
LONG ISLAND RAILROAD, et al.,	:	
Defendant.	:	

- -x

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Plaintiff Edward E. Harris ("Harris"), as a named plaintiff in the above action and a member of the class of black employees of the Long Island Railroad ("LIRR"), moves by order to show cause for a temporary restraining order and a preliminary injunction directing the defendant LIRR to reinstate him to his former position of Assistant Station Master ("ASM") and restraining the LIRR from future violations of his rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Harris also moves for back pay and reasonable counsel fees. This court has jurisdiction under 42 U.S.C. §2000e-5(f)(3).

Harris alleges that he is entitled to the requested relief under 42 U.S.C. §2000e-5(g)[1] because his demotion from the position of ASM was the result of race discrimination, 42 U.S.C. §2000e-2(a),[2] and/or retaliation for his participation in this lawsuit. 42 U.S.C. §2000e-3(a).[3] Harris also alleges that he has been deprived of his Fourteenth Amendment due process rights because the LIRR did not grant him a hearing in connection with his demotion. The LIRR contends that Harris was lawfully dismissed for poor performance, insubordination and his past employment record and is therefore not entitled to the requested relief. The court denies plaintiff injunctive relief.

Plaintiff's motion having been brought before this court on November 19, 1976, the motion was set for

hearing the following day and the TRO application denied. The LIRR was prepared to commence the hearing the next day, however, at plaintiff's request the hearing was postponed to allow plaintiff further discovery. Six days of evidentiary hearings were held in December, 1976 and January, 1977. Sixteen witnesses were called and numerous depositions and exhibits were introduced into evidence. The court having considered the pleadings, the testimony of witnesses and the documents in evidence makes the following findings of fact and conclusions of law as required by Rule 52 Fed. R. Civ. P.

A brief summary of the history of Harris' employment with the LIRR including his involvement underlying the instant preliminary injunction action is initially required. Plaintiff is a black American citizen, 55 years of age. He was first employed by the Pennsylvania Railroad in 1954 as a mail handler. In 1963 he became an usher, the top union job at the Pennsylvania Railroad, and in 1964 he went on the Long Island Railroad's payroll. In 1972 he was appointed an ASM, a management level, non-union job.

On two prior occasions plaintiff has appeared before this court seeking injunctive relief for alleged LIRR discrimination. The first time, in September 1974, the LIRR attempted to demote the plaintiff from ASM to usher status on the ground that he had failed a Book of Rules examination. After a hearing, the matter was re-

solved when the LIRR agreed to restore Harris to the position of ASM if he passed another Book of Rules examination administered to a randomly selected group of ASMs. This examination was conducted and Harris, receiving the highest score of the seven ASMs who took the test, was immediately reinstated.

The second request for injunctive relief occurred in September 1975 when the LIRR removed Harris from service as an ASM for alleged insubordination and dereliction of duty when he argued with his superior and failed to have an usher announce a track change for a departing train. After a three day hearing in this court, the LIRR agreed to reinstate Harris to his ASM position after Harris agreed to accept a 60 day suspension.

At that 1975 hearing, the LIRR introduced evidence of Harris' prior unsatisfactory performance in his ASM position in 1974 and 1975. This evidence included five instances, not effectively rebutted by the plaintiff, where Harris was formally notified or reprimanded for his failure to make proper log entries or reports or for his poor performance in connection with train delays.

On November 11, 1976, Harris was again removed from his ASM position. This removal is the cause of plaintiff's current motion for injunctive relief. Harris worked the 11:00 P.M. November 9th to 7:00 A.M. November

10th ASM shift at Pennsylvania Station. On that night shift the ASM is in overall charge of the LIRR operation at the railroad station. On that morning of November 10th the departure of four trains was delayed. Harris was demoted for his alleged responsibility for the delay, for failing to timely file a specially requested report of the November 10th incident, and for his past record.

On the morning of November 10th four LIRR trains were delayed directly or indirectly up to eleven minutes by the taking out of service of line 3 of Pennsylvania Station, the Long Island Railroad's eastbound tunnel. When line 3 is taken out of service, the departing Long Island Railroad trains must be rerouted by the ASM to share line 1, Amtrak's eastbound tunnel. Line 3 is removed from service several times a month, usually between midnight and 1:00 A.M., for regularly scheduled maintenance.

It is undisputed that on the night of November 9, 1976, Harris and other Long Island Railroad personnel knew that line 3 would be going out of service sometime after 11:00 P.M., and that Harris ascertained this fact at the time he reported for duty. The exact time line 3 closes is determined by the operator in Amtrak's A Tower and then communicated to other Amtrak and Long Island Railroad personnel. The ASM must ascertain the time line 3 is to close in order to position Long Island Rail-

road trains on their arrival so that they can use line 1 after line 3 is closed without changing crews and without unnecessary delay. That night A Tower determined that line 3 would close at 12:41 A.M. after the departure of Train 400 and prior to the departure of Train 82.

At the hearing there was sharply conflicting testimony as to the exact time Harris received notice of the closing. Notice is received over a squawk box in the ASM's office. Several defense witnesses testified that Harris had notification between 11:55 P.M. and 12:05 A.M., in sufficient advance notice for him to reposition the LIRR trains and avoid the subsequent delays, while Harris testified that he received no notice until 12:41 A.M., the exact time of the closing.

The court does not resolve this factual dispute but only notes that Harris had a duty to be more thorough in his investigation of the time of the line closing and more cautious and responsible in performing his ASM duties. Harris and all other LIRR and Amtrak employees on duty that night knew that line 3 was going out after 11:00 P.M. and based on recent past Penn Station history he had good reason to know that it was likely it would go out prior to or around the time of the departure of Train 82, requiring that train, and those following it,

to be diverted to line 1.[4] He also knew that A Tower, which often conferred with ASMs on line closings, had often not been communicating with him over the past months.[5] Because of the important duties of the ASM between notification and closing of line 3, Harris, particularly in view of his communication problems, had the responsibility to continuously investigate and to ascertain the exact time of the closing. Even assuming as true Harris' disputed testimony that he was out of the office between 12:15 and 12:25 A.M. and could not hear the squawk box communications, it is not enough that he called the yardmaster twice between 11:45 and 12:15 to find out when line 3 was going out. Further, that absence at a crucial time is not sufficient excuse. Harris should have properly repositioned Train 82, and even if he was notified at 12:41 of the line 3 closing, he should have been alert to promptly reposition and avert or reduce the delays of the following trains. While others may have also been able to avert these delays, Harris had the final responsibility.

As a result of the delay of the four trains, the assistant superintendent of transportation for the LIRR on the morning of November 10th requested the terminal superintendent, Mr. Gaynor, to find the reason for the delay. Gaynor instructed an assistant to request Harris to provide a written report setting forth the facts of the delay. Harris was told when he reported

to work at 11:00 P.M. on November 10th that Gaynor wanted the report by the end of Harris' shift the following morning.

Harris knew that Gaynor's request for a written report was a serious request and while such a written request was infrequently demanded it was in keeping with proper LIRR policy to find the reasons for delays and other operational failures. Harris was told by Gaynor's assistant that the station master's log book report, which Harris had already written, was insufficient and Harris knew he had to prepare a new and more complete written report. Harris did not write the report during his shift because he claimed he was too busy. While there were some active periods that night, Harris could have written the report any time during his shift.

Failing to write the report during his shift and declining to stay late, Harris returned home. He called a supervisor at the LIRR and told him when he arrived home that morning that he had not completed the report. He received an extension and was told to bring the report with him that evening. Harris failed to write the report by that evening claiming that a dental emergency involving the replacing of an inlay prevented him from writing the report. However, he was only at the dentist's office between 5:00-6:00 P.M. He returned home by 7:00 P.M. and instead of writing the

report went back to sleep, ate dinner and returned to work. When he reported to work at 11:00 P.M. Gaynor, who works the day shift, was in his office and requested the report and an explanation. Harris, failing to produce the report, was told to exercise his seniority rights.[6]

Title VII Claim

Plaintiff moves for a preliminary injunction under Title VII claiming, as noted above, that he was demoted because of his race[7] or in retaliation for his involvement in this lawsuit.[8] As an individual class member to a Title VII suit, Harris is entitled to move for such preliminary relief. See Culpepper v. Reynolds Metals Co., 421 F.2d 888, 893-94 (5th Cir. 1970); Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969). The settled rule in this Circuit is that "a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Gresham v. Chambers, 501 F.2d 687, 691 (2d Cir. 1974), quoting Sonesta Int'l. Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973). This court holds that plaintiff, having failed to show either "probable success on the merits" or "sufficiently

serious questions going to the merits to make them a fair ground for litigation" for either of his claims, is not entitled to injunctive relief.[9] Cf. Gresham v. Chambers, supra at 691.

In evaluating plaintiff's claim, it is important for the court to note that an employer may discharge an employee for any reason except discrimination or retaliation against the employee's protected Title VII activities. See Christian v. General Motors Corp., 341 F. Supp. 1207, 1214 (E.D. Mo. 1972), aff'd without opinion, 475 F.2d 1407 (8th Cir. 1973); Barnes v. Lerner Shops of Texas, Inc., 323 F. Supp. 617, 622 (S.D. Tex. 1971). Title VII does not require that an employer like his employees. "No federal statute prohibits discrimination per se; rather, what is prohibited is discrimination that is racially motivated." Richardson v. Hotel Corp. of America, 332 F. Supp. 519, 521 (E.D. La. 1971), aff'd, 468 F.2d 951 (5th Cir. 1972); accord, Bradington v. International Business Machines Corp., 360 F. Supp. 845, 854 (D. Md. 1973), aff'd, 492 F.2d 1240 (4th Cir. 1974).

In weighing the evidence in this case, this court takes notice of the Supreme Court decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973), where the Court allocated the burden of proving the facts necessary to establish liability in Title VII actions.[10]

Initially, the plaintiff must carry the burden of establishing a prima facie case of racial discrimination. The burden of going forward with the evidence then shifts to the defendant to show a nondiscriminatory reason for the employee's demotion. Plaintiff is then afforded an opportunity to show that defendant's asserted reason is a mere pretext. Id.; see Garrett v. Mobil Oil Corp., 531 F.2d 892, 895 (8th Cir. 1976); Franklin v. Crosby Type Co. Int'l. Typo. Union, 411 F. Supp. 1167, 1171-72 (N.D. Tex. 1976). In this case these same burdens would apply for a showing of "probable success on the merits" or "sufficiently serious questions going to the merits to make them a fair ground for litigation" in order to meet the standard for a preliminary injunction.

The court finds that plaintiff proved a prima facie case. Harris belongs to a racial minority, he held a job with the LIRR and according to his testimony he performed his work within the normal qualifications required. He further testified that he was removed from his ASM position without legal cause. See McDonnell Douglas v. Green, supra at 802; Potter v. Goodwill Industries of Cleveland, 518 F.2d 864, 865 (6th Cir. 1975); Franklin v. Crosby Type Co. & Int'l. Typo. Union, supra at 1171.

However, the court finds, when the burden is shifted to the defendant, upon the entire evidence includ-

ing the demeanor of witnesses who testified at the hearing, that the LIRR removed Harris for valid, nondiscriminatory reasons and has therefore sustained its burden. A combination of three factors justifies the LIRR's demotion of Harris. First, and most critically, was Harris' insubordinate failure to supply the urgently requested report explaining the train delays of the morning of November 10, 1976 The LIRR had a clearly legitimate interest in requesting the report to find the cause for the delays. Harris understood the serious urgency of the request, and he had an opportunity both during his shift on November 10-11 and during the day of November 11 to prepare the report and elected not to do so. This factor combined with his activities as ASM on the night of the train delays constitute sufficient insubordination and poor performance to justify his removal. During his shift he had a responsibility and a duty to find out when line 3 was going out and to plan accordingly. Without deciding whether he was directly responsible for the delays that night, this court concludes that Harris was negligent in his ASM duties. Additionally, Harris' past conduct as an ASM including the reprimands and notices of his poor performances in 1974 and 1975 and the activities and evidence of insubordination surrounding his 60 day suspension in 1975 must be considered in upholding his present removal. In view of all these factors and

circumstances, the LIRR's decision to order Harris to exercise his seniority was a racially neutral, fair and justifiable personnel decision. See Garrett v. Mobil Oil Corp., 395 F. Supp. 117, 125 (W.D. Mo. 1975), aff'd, 531 F.2d 892 (8th Cir. 1976), and cases there cited.

After proof that the plaintiff's discharge was for cause, the burden of persuasion returns to the plaintiff to show that the defendant's stated reason for discharge was in fact a pretext for discrimination prohibited by Title VII. McDonnell Douglas v. Green, supra at 804. Plaintiff has failed to meet this burden. Plaintiff has failed to prove any racial or retaliatory motive on the part of the LIRR. Proof of a statistical imbalance in the LIRR's management hiring is alone not enough to show such a pretext.

This court recognizes that an employer can remove and refuse to reinstate an employee only if the criterion applied is applied alike to members of all races. McDonnell Douglas v. Green, supra at 804. However, plaintiff failed to establish evidence of disparate treatment in his case sufficient to meet his burden of establishing such a pretext. The LIRR introduced evidence of twenty white management employees who were dismissed or told to exercise their seniority rights between 1971 and 1975. Ten of these employees were removed specifically

for insubordination in their refusal to cross a union picket line during a lengthy LIRR strike in 1972. The others were removed for a variety of reasons including poor performance, lackadaisical handling of assignments, failing to report train delays and a combination of these reasons. The LIRR also introduced evidence of other white management employees similarly removed from service since 1975. While the plaintiff introduced evidence of white management employees who received lesser discipline for different infractions, in view of the LIRR's overall disciplinary policy, this court cannot find that plaintiff has met his burden of showing that his punishment for his particular conduct was more severe than that of other white management employees or that the removal of other white management employees was for conduct more egregious than Harris' conduct leading to his removal. Plaintiff's overall employment record and the conduct that triggered his November 11th dismissal gave the LIRR good, nondiscriminatory grounds to remove him with no indication that a white management employee would have received different discipline. Therefore, this court does not find that plaintiff has presented the necessary evidence of disparate treatment under the circumstances of Harris' removal to meet his burden and to be entitled to injunctive relief.

In sum, on the record here there is no evidence to support plaintiff's conclusory assertion that he was

dismissed because of his race or in retaliation for his activities in the Title VII class action suit. While plaint[illegible] has made out a prima facie case, defendant has met its burden of showing nondiscriminatory reasons for the removal and these reasons were not pretextual. Rather, evidence in this case establishes that plaintiff was removed from his ASM position by the LIRR solely because of plaintiff's unsatisfactory conduct as an employee and that factors of race or status as a plaintiff in the class action lawsuit had no bearing on the LIRR's actions. Plaintiff has shown no violation of 42 U.S.C. §§2000e-2(a) or 2000e-3(a) and has not met either of the alternative criterion for a preliminary injunction under Sonesta Int'l. Hotels Corp. v. Wellington Assoc., supra. He is therefore not entitled to injunctive relief under 42 U.S.C. §2000e-5(g).

Due Process Claim

Plaintiff contends that his demotion from the position of Assistant Station Manager without a hearing is in violation of his rights under the Due Process Clause of the Fourteenth Amendment. The court finds the plaintiff's argument unpersuasive and holds that the LIRR, even assuming it is acting under color of state law,[11] was not required to give plaintiff a due process hearing under the Fourteenth Amendment.

At the threshold, successful assertion of any due process claims turns on whether Harris' interests

in retaining his ASM position rise to the level of those encompassed by the Fourteenth Amendment's protection of "property" or "liberty". The Supreme Court decisions in Board of Regents v. Roth, 408 U.S. 564 (1972) and Perry v. Sindermann, 408 U.S. 593 (1972) provide that when either a deprivation of a property interest, such as a termination of an employment contract, or a deprivation of liberty, such as an employment record that operates to absolutely foreclose other employment opportunities, result from the decision to discharge an employee, due process requires that notice of the charges and a hearing must be granted to the employee. See Velger v. Cawley, 525 F.2d 334, 336 (2d Cir. 1975), rev'd on other grounds sub nom., Codd v. Velger, 45 U.S.L.W. 4175 (U.S. Feb. 22, 1977); Simard v. Board of Education of Town of Groton, 473 F.2d 988, 992 (2d Cir. 1973).

Plaintiff's Property Interest in His Employment

The Supreme Court in Board of Regents v. Roth, supra, and Perry v. Sindermann, supra, defined those "property" interests that require procedural due process protections. Such "property" interests include contractual or statutory rights to continued employment as well as rights acquired under a "de facto tenure program" resulting from the existence of rules and understandings, promulgated and fostered by state officials, that may justify [a] legitimate claim of entitlement to continued

employment. . . ." Perry v. Sindermann, supra, 408 U.S. at 600, 602; see Russell v. Hodges, 470 F.2d 212, 216 (2d Cir. 1972). However, a mere "unilateral expectation" of continued employment is not sufficient "property" to trigger due process guarantees. Board of Regents v. Roth, supra, 408 U.S. at 577; see Wahba v. New York University, 492 F.2d 96, 98 n. 2 (2d Cir.), cert. denied, 419 U.S. 874 (1974).

In this case, plaintiff has not shown any "property" interest in continued employment. Plaintiff, as an appointed, nonrepresented, management employee of the LIRR, has alleged no contractual or statutory claim to continued employment. Furthermore, Harris, although he was a "permanent" ASM and had worked as an ASM for five years, was not entitled to tenure protection and alleged nothing to show de facto tenure. See Bishop v. Wood, 96 S. Ct. 2074 (1976); Russell v. Hodges, supra at 217.

Harris had at most a "unilateral expectation" of continued employment, as there existed no well-established joint understanding as required for a "de facto tenure program." Simard v. Board of Education of Town of Groton, 473 F.2d 988, 992 (2d Cir. 1973). Harris knew that when he was promoted from a union position to a management position that the LIRR was making no promises about his continued employment. The LIRR had in the past dis-

missed or disciplined a significant number of management employees including Harris who had accepted a sixty day suspension in 1975.[12] As such, there could be no mutual expectation of continued employment sufficient to establish a "property" interest deserving of the protection of due process.

Plaintiff's Claim of a Deprivation of Liberty

In order to demonstrate a deprivation of "liberty", Harris must demonstrate that the reasons given for his demotion "might seriously damage his standing and associations in his community" or had imposed "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Board of Regents v. Roth, supra, 408 U.S. at 573; see Wahba v. New York University, supra, 492 F.2d at 98 n. 2; Simard v. Board of Education, supra, 473 F.2d at 992; Russell v. Hodges, supra, 470 F.2d at 216. The Court made clear that by the latter phrase it meant something more than the inevitable disadvantage when a person "simply is not rehired in one job but remains as free as before to seek another." Board of Regents v. Roth, supra at 575; see Russell v. Hodges, supra at 216; Haron v. Board of Education of City of New York, 411 F. Supp. 68, 73 (E.D.N.Y. 1976). "Mere proof, for example, that his record of non-retention

in one job, taken alone, might make him somewhat less attractive to some other employers would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of 'liberty.'" Board of Regents v. Roth, supra at 574 n. 13.

The Supreme Court in Board of Regents v. Roth, supra at 573, stated that a charge of dishonesty or immorality could implicate an individual's "liberty" interest. In this case Harris by being charged with poor performance and insubordination has not been deprived of his "liberty" within the meaning of Board of Regents v. Roth. There is no suggestion, as required to invoke due process protection, that Harris' "good name, reputation, honor, or integrity is at stake because of what the [LIRR] is doing to him. . . ." Id. at 573, quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); see Bishop v. Wood, supra at 2079-80. The Supreme Court's notion of liberty in Board of Regents v. Roth distinguishes between a stigma of moral turpitude, which infringes the liberty interest, and a charge of incompetence or inability to get along with co-workers which does not. Stretten v. Wadsworth Veterans Hospital, 537 F.2d 361, 365-66 (9th Cir. 1976); Jablon v. Trustees of California State Colleges, 482 F.2d 997, 1000 (9th Cir. 1973), cert. denied, 414 U.S. 1163 (1974). In this case Harris' demotion for failing to adequately perform his duties as an ASM and failing to provide an urgently requested re-

port falls into the latter category. The Ninth Circuit, in a case more egregious then the case at bar, found that charges of "insubordination, incompetence, hostility toward authority, and aggressive behavior. . . do not import serious character defects such as dishonesty or immorality" and do not warrant a hearing, as contemplated by Board of Regents v. Roth. Gray v. Union County Intermediate Education District, 520 F.2d 803, 806 (9th Cir. 1975).

The LIRR in demoting Harris did not attack his honesty or integrity. The fact that his demotion and the reasons for it may have a deleterious effect upon his future employment prospects is unfortunate but the Supreme Court in Board of Regents v. Roth, supra, at 574 n. 13, specifically noted that this "kind of foreclosure of opportunities" does not give rise to a right to a hearing. See Jablon v. Trustees of California State Colleges, supra, 482 F.2d at 1000; cf. Bishop v. Wood, supra at 2079-2080.

Even if the "liberty" interests of Harris were infringed, this court's post demotion hearing satisfies due process requirements. Five days after Harris was dismissed from his ASM job he moved in this court for an order to show cause and for a temporary restraining order to be reinstated in his ASM position. The court offered to commence the hearing the following day and because of plaintiff's unwillingness to proceed denied the temporary restraining order. The eventual hearing, after extensive deposi-

tions, lasted six days and Harris, represented by counsel, was accorded full due process. If a stigma had attached because of his demotion, his entitlement under the Due Process Clause to a hearing to confront the allegations and refute the charges against him was satisfied by the hearing before this court. See Codd v. Velger, 45 U.S.L.W. 4175 (U.S. Feb. 22, 1977). The Supreme Court in Arnett v. Kennedy, 416 U.S. 134, 157 (1974), in referring to a hearing where liberty interests are at stake stated, "[s]ince the purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name', a hearing afforded . . . after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause". See Codd v. Velger, supra at 4175-76; Morgan v. Fletcher, 518 F.2d 236, 241 (5th Cir. 1975). Furthermore, in this case the court has found no evidence of dishonesty or immorality on the part of plaintiff so that even if he were accused of an act of moral turpitude, which the court does not find, the post-demotion hearing before this court has removed any wrongful stigma from plaintiff's reputation and satisfies due process requirements.

Conclusion

The court has found that plaintiff was removed from his ASM position solely for his insubordination, poor

performance and his past employment record. The action of the LIRR on November 11, 1976 in ordering Harris to exercise his seniority rights was not the result of discrimination on account of his race or in retaliation for his participation in the class action suit. While this court, were it in the position of the LIRR, may not have under the circumstances removed an individual with Harris' ability, this was an employment decision for the LIRR to make and, absent proof of discrimination, this court cannot interfere with it.

The court has further found that plaintiff was not deprived of his Fourteenth Amendment due process rights because of the LIRR's failure to grant him a hearing. Therefore, plaintiff's motion for a preliminary injunction is denied in all respects.

So Ordered.

/s/
U.S.D.J.

Dated: New York, New York
March 25, 1977.

FOOTNOTES

1. 42 U.S.C. §2000e-5(g) provides in relevant part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the . . . hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual . . . was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

2. 42 U.S.C. §2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

3. 42 U.S.C. §2000e-3(a) provides in relevant part:

> It shall be an unlawful practice for an employer to discriminate against any of his employees or applicants for employment, . . . to discriminate

> against any individual, . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

4. In the three months prior to November 9, 1976 line 3 was closed ten times for scheduled maintenance. At least eight of those times Train 82 had to be diverted to line 1 and five of those times the actual closing of line 3 occurred after the departure of Train 400 and before the departure of Train 82. Stretching back over a two year period Train 82 had to be diverted to line 1 for over one-third of the scheduled maintenance closings of line 3. Pltf's supplementary memorandum and Pltf's Ex. 10.

5. Employees of A Tower and other Amtrak employees expressed, in their testimony or on taped conversations on the night of November 9th, that they had great difficulty working with Harris and that they avoided dealing with him and questioned his ability. Def's Exh. O, P.

6. Harris, when told to exercise his seniority rights, was being told that he was being removed from his management position and should return to his union job as an usher with the seniority rights he had as a union employee.

7. See, e.g., Garrett v. Mobil Oil Corp., 531 F.2d 892, 895-96 (8th Cir. 1976); Potter v. Goodwill Industries, 518 F.2d 864, 865 (6th Cir. 1975); Franklin v. Crosby Type Co. & Int'l. Typo. Union, 411 F. Supp. 1167, 1171-72 (N.D. Tex. 1976); Christian v. General Motors Corp., 341 F. Supp. 1207 (E.D. Mo. 1972), aff'd. without opinion, 475 F.2d 1407 (8th Cir. 1973).

8. See, e.g., Gillin v. Federal Paper Board Co., Inc., 479 F.2d 97, 100-01 (2d Cir. 1973); Pettway v. American Cast Iron Pipe Co., 411 F.2d 998 (5th Cir. 1969); EEOC v. Keller, Philips, Ross, Inc., 401 F. Supp. 66 (S.D.N.Y. 1975); McFadden v. Baltimore Steamship Trade Ass'n., 352 F. Supp. 403, 411 (D. Md. 1973).

9. This court recognizes that while the posture of this case is a motion for a preliminary injunction in the context of the class action suit, the six day hearing closely approximated a full hearing on the merits of Harris' individual claim respecting his demotion. As

such the court is able to assess the likelihood of success on the merits and questions that are fair ground for litigation with the view that as to this specific claim little additional evidence would be available. Cf. Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1003 (5th Cir. 1969).

10. Although expressed in the context of a non-class action proceeding, the analysis of McDonnell Douglas v. Green, supra would appear fully applicable to Harris' claim for injunctive relief, in that Harris' action relates solely to the individual circumstances surrounding his own demotion. See Predmore v. Allen, 407 F. Supp. 1067, 1070 n. 5 (D. Md. 1976).

11. Although not necessary to the court's determination, it appears that the LIRR as a "subsidiary corporation" of the Metropolitan Transportation Authority (MTA) since 1966, is acting under color of state law and is bound by the requirements of the Fourteenth Amendment. See Quintero v. Long Island Railroad, 55 Misc.2d 813, 286 N.Y.S.2d 748 (S. Ct. Kings Co. 1968); see also Taylor v. New York City Transit Authority, 433 F.2d 665 (2d Cir. 1970); Kissinger v. New York City Transit Authority, 274 F. Supp. 438, 441 (S.D.N.Y. 1967). The MTA is a "public benefit corporation" created by the State of New York in 1965. Title 11, Public Authority Law §§ 1263 and 1266 (McKinney 1970). The LIRR as a subsidiary corporation entirely owned and operated by the MTA, enjoys the "privileges, immunities, tax-exemptions and other exemptions" of the MTA and is "subject to the restrictions and limitations to which the authority may be subject." Public Authorities Law §1266(5). Under the circumstances, the LIRR is acting under color of state law. See Burton v. Wilmington Parking Authority, 365 U.S. 715, 726 (1961).

12. In each case, these disciplinary procedures were without a due process hearing of any kind.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

FRANCES JOY CAPERS, EDWARD E. HARRIS, et al., each individually and on behalf of all other persons similarly situated,	:	72 Civ. 3168
Plaintiffs,	:	NOTICE OF APPEAL
-against-	:	
LONG ISLAND RAILROAD, et al.,	:	
Defendants.	:	

- -x

Notice is hereby given that Edward E. Harris, one of the individual plaintiffs above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order denying said plaintiff's motion for a preliminary injunction entered in this action on the 13th day of April, 1977.

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